Supreme Court, U.S.
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No. 04-1224

In The

Supreme Court of the United States

GARLAND HOGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court should grant the petition for a writ of certiorari, vacate the judgment, and remand the case to the Eleventh Circuit for further consideration in light of this Court's recent decision in *United States v. Booker*, where the district court and the court of appeals applied the mandatory guidelines pre-*Booker*.

II. Whether the Eleventh Circuit's new rule – that issues not raised in the initial brief are forever forfeited – is contrary to this Court's decisions, the decisions of every other circuit, and the rules of criminal procedure.

INTERESTED PARTIES

Juan Arroya, Wanda Tirado, Gary Pierce, Zane Balsam, and Alan Lewis were co-appellants in the Eleventh Circuit and are interested parties to the proceeding herein.

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PETITION FOR WRIT OF CERTIORARI

Garland Hogan respectfully petitions the Supreme Court of the United States for a writ of certiorari to review 1) the judgment of the United States Court of Appeals for the Eleventh Circuit in *United States v. Garland Hogan, et al.*, Case No. 10368TT (June 24, 2004), which affirmed the judgment of the United States District Court for the Southern District of Florida, and 2) the denial of the petition for rehearing *en banc* and the denial of the motion for supplemental briefing entered on December 17, 2004.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (App. 1). Also included in the appendix is 1) the court of appeals' order denying Hogan's petitions for panel rehearing and rehearing *en banc* (App. 55); and 2) the court of appeals' order denying leave to file a supplemental brief addressing *Blakely v. Washington,* 542 U.S. ___, 124 S. Ct. 2531 (2004) (App. 44).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. This petition is timely filed pursuant to SUP. CT. R. 13.1 and 13.3.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fed. R. Crim. P. 52(b):

> Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

Remarkably, the defendant in this case was sentenced to 28 *years* in prison based on his 17 *month* employment as in-house counsel at a fraudulent company. (App. 47-48) It is the prototypical example of the constitutional flaws that existed with the mandatory guideline system. A first time non-violent offender received a 28 year federal prison term based on a "bureaucratically prepared, hearsay-riddled presentence report[]." *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 785, 790 (2005) (Scalia, J.) (dissenting). In light of this Court's decision in *Booker*, Mr. Hogan is entitled to a new sentencing.

Petitioner Garland Hogan, along with four other defendants, was charged with various counts of fraud and money laundering based on his employment with a fraudulent viatical investment company. (App. 57) Mr. Hogan proceeded to trial and was convicted. The jury was not asked to make any special findings as to sentencing enhancements or restitution.

Although Mr. Hogan's base offense level under the then-mandatory Federal Sentencing Guidelines resulted in a 0-6 month sentence, the sentencing judge increased that base offense level with 35 points of sentencing

enhancements[1] that were found by a preponderance of the evidence based on the judge's reading of a presentence investigation report. This drastic increase resulted in a sentence of 324 months imprisonment. (App. 47-48) The court also ordered restitution of over $108 million and three years of supervised release. (App. 52) Mr. Hogan objected as to each specific enhancement. And even though the sentencing pre-dated *Blakely* and *Booker,* he had the foresight to make *Apprendi*-based objections to the sentence. Mr. Hogan timely appealed to the Eleventh Circuit.

On June 24, 2004, the same day that this Court decided *Blakely v. Washington,* 542 U.S. ___, 125 S.Ct. 2531 (2004), the Eleventh Circuit affirmed Mr. Hogan's conviction and sentence. It reviewed the sentencing findings for clear error and noted that at least one of the enhancements was a "close call." (App. 41) Nevertheless, the Eleventh Circuit held that "[i]n order to reverse the district court on [sentencing] issue[s], . . . we would have to conclude that the district court clearly erred in making its finding[s]." (*Id.*) In so doing, the Eleventh Circuit applied the 18 U.S.C. § 3742(e) standard of review that was applicable to guidelines appeals prior to this Court's decision in *Booker,* 543 U.S. at ___, 125 S.Ct. at 763 (holding that the standard of review is whether the sentence was "unreasonable" and applying standard to all cases on direct review).

Mr. Hogan timely petitioned the appellate court for rehearing *en banc* to address *Blakely's* relevance to the

[1] These enhancements included, among others, amount of loss (which included "relevant conduct" loss), supervisory role, vulnerable victims, and abuse of a position of trust. (App. 31-42)

sentencing issues, and also filed a motion to supplement his brief with a discussion of *Blakely*. The court of appeals denied these motions for two reasons: 1) it found that *Blakely* did not apply to the Federal Sentencing Guidelines in *United States v. Reese*, 382 F.3d 1308 (11th Cir. 2004)[2] and 2) the Eleventh Circuit decided – contrary to this Court's decisions and contrary to every other circuit – that issues not raised in a principal brief (even if those issues were based on Supreme Court cases not in existence at the time of the principal brief) were forever waived. (App. 44) (citing *United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000)). This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. This Court's decision in *United States v. Booker* requires that this Court grant the petition for a writ of certiorari, vacate the judgment, and remand the case to the Eleventh Circuit for further consideration.

There is no question that the district court sentenced Garland Hogan under the a mandatory application of the Federal Sentencing Guidelines in violation of the Sixth Amendment to the Constitution. And there is no question that the Eleventh Circuit, applying the clear error standard on review (and not the "reasonableness" standard mandated in *Booker*), affirmed this sentence. Because

[2] The Eleventh Circuit subsequently vacated *Reese* after this Court decided *Booker*. 2005 WL 172024 (11th Cir. Jan. 27, 2005).

Booker applies to all cases on direct review, 125 S. Ct. at 769, this Court should grant the petition for a writ of certiorari, vacate the judgment, and remand the case to the Eleventh Circuit for further consideration in light of *Booker,* as it has done in numerous other cases in the same posture. *See, e.g., William Sterling v. United States,* Case no. 04-7827 (Jan. 24, 2005) (representing one of over 500 cases GVRed in light of *Booker*).

A. Holdings in *United States v. Booker*

Justice Stevens' majority opinion in *Booker* held that the mandatory Federal Sentencing Guidelines were unconstitutional because judges, not juries, were finding facts that enhanced sentences. 543 U.S. at __, 125 S. Ct. at 748 (reaffirming its holding in *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000)). A different majority, led by Justice Breyer, held that the remedy was to make the mandatory guidelines advisory. *Booker*, 125 S. Ct. at 757. The Court held that sentencing courts are required to consider each of the factors in 18 U.S.C. § 3553. The Breyer majority also found that the standard of review for an appellate court reviewing a sentencing decision is whether the sentence was "unreasonable." *Id.* at 765. Finally, the *Booker* Court made clear that the decision applies to all cases on direct review. *Id.* at 769 (quoting *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a clear break with the past.") (internal quotations omitted).

B. Applicability to this case

Because this case is on direct review,[3] there can be no dispute that *Booker* applies to it. On the very day that this Court decided *Blakely v. Washington,* which cast into doubt the constitutionality of the Federal Sentencing Guidelines, the Eleventh Circuit affirmed Mr. Hogan's sentence. Mr. Hogan then moved for rehearing and for permission to supplement the record in light of *Blakely*. On December 17, 2004 (before *Booker* was decided), the Eleventh Circuit denied both requests because, *inter alia*, of its decision in *United States v. Reese,* 382 F.3d 1308 (11th Cir. 2004). The *Reese* court held that *Blakely* did not apply to the Federal Sentencing Guidelines. The Eleventh Circuit has since been advised to the contrary by this Court's decision in *Booker*, and has since vacated *Reese*, 2005 WL 172024 (11th Cir. Jan. 27, 2005).

This Court has vacated many similar decisions from the Eleventh Circuit and remanded for further consideration. It should do so here for the same reasons: 1) Hogan's 28 year sentence under the mandatory guidelines violated the Sixth Amendment; and 2) the appellate review of the sentence was conducted under the wrong standard.

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[3] "A case is final only when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally is denied." *Griffith,* 479 U.S. at 321 n. 6 (internal quotations omitted).

1. Mr. Hogan was sentenced under the mandatory guidelines to 28 years in prison based on findings by a district judge using a mandatory guideline system in violation of the Sixth Amendment.

There can be no real dispute that Mr. Hogan's 28 year sentence violates the Sixth Amendment just as Booker's sentence did. Booker was charged with and convicted of possession with intent to distribute at least 50 grams of cocaine base. The jury heard evidence that he had 92.5 grams in his duffel bag, yet the district judge at sentencing found that Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice. Those findings increased his sentencing range from 210 to 262 months in prison to 360 to life in prison, and the judge sentenced Booker to 360 months in prison. In other words, instead of a sentence of 21 years and 10 months that the judge could have imposed on the facts proved to a jury beyond a reasonable doubt, Booker received a 30 year sentence on facts found by a judge by a preponderance.

The Seventh Circuit, applying *Blakely*, reversed Booker's sentence. It found that the guidelines conflicted with this Court's decisions and the Sixth Amendment because "the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Booker*, 125 S. Ct. at 749 (internal quotations omitted). This Court affirmed and remanded the case for resentencing. *Id.*

The same principles apply to Mr. Hogan's case. His base offense level after trial (based on the jury's verdict)

resulted in a sentence of 0-6 months. The district judge, using the mandatory guidelines, skyrocketed Mr. Hogan's offense level to 41, resulting in a range of 324 to 405 months. This increase was based on findings made by the district judge using a preponderance of the evidence standard in violation of the Sixth Amendment as explained in this Court's decisions of *Apprendi*, *Blakely*, and *Booker*, and resulted in a 28 year sentence – an unbelievable *5600%* increase.

2. The Eleventh Circuit reviewed the district court's decision under the wrong standard of review.

The court of appeals, in reviewing the district court's sentencing decision, applied clear error review limiting its review of the district court's ultimate sentencing decision to a determination of whether there was some evidence in the record to support the district court's factual finding as to the enhancements. (App. 41) In so doing, the court of appeals failed to undertake the independent "reasonableness" review mandated by this Court's decision in *Booker*. 125 S.Ct. at 763, 769; *see, e.g., United States v. Yahnke,* No. 04-1098, 2005 WL 221451, *1 (8th Cir. Feb. 1, 2005) ("The Supreme Court in *Booker* excises section 3742(e) and any *de novo* review of sentences. *See Booker,* 125 S.Ct. 738. This court now reviews sentences for 'unreasonable[ness].' *Id.* at 763."); *United States v. Davis,* No. 03-4114, 2005 WL 130154, *4 (6th Cir. Jan. 21, 2005) (unpub.) ("In a case such as this one, where Defendant contests the manner in which the district court applied the consulted Guideline, we are instructed to review the sentence for reasonableness."); *United States v. Tanner,* No. 02-10661, 2005 WL 147590, *2 (9th Cir. Jan. 25, 2005) (unpub.) (applying

"reasonableness" standard to guidelines appeal in light of *Booker*).

The court of appeals failed to use the correct standard of review, as announced in *Booker*, because it did not determine whether petitioner's sentence is reasonable in light of all of the relevant statutory factors under 18 U.S.C. § 3553(a). For that reason, even if the Court fails to grant merits review of the significant issue-preclusion rule raised in question two of this petition, the case should nevertheless be remanded to the Eleventh Circuit for reconsideration in light of *Booker*.

II. The Eleventh Circuit's new rule – that issues not raised in the initial brief are forever forfeited – is contrary to this Court's decisions, the decisions of every other circuit, the rules of criminal procedure and public policy.

In denying relief to Mr. Hogan, the Eleventh Circuit applied a rule of procedural default to be found nowhere else in American federal jurisprudence. In the wake of this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Eleventh Circuit announced that henceforward a litigant on direct appeal cannot "raise new issues at supplemental briefing, even if the issues arise based on the intervening decisions" of this Court. *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000). All issues not raised in an initial brief are to be deemed "abandoned," *id.*, the import of after-occurring decisions by the Supreme Court of the United States notwithstanding.

In the words of a former chief judge of the Eleventh Circuit, who dissented energetically from the coining of this new rule of procedural default,

> The . . . new rule is that cases are entitled to the benefit of an intervening [Supreme Court] decision [resulting in a change in substantive law] *only if*: (1) the case was not yet final at the time of the intervening decision; *and* (2) the litigant presaged the intervening decision by raising the issue addressed by the that decision in the litigant's initial brief on appeal.

United States v. Ardley, 273 F.3d 991, 999 (11th Cir. 2001) (Tjoflat, J., dissenting from the denial of rehearing *en banc*) (emphasis in original).

It is, of course, true that the United States Court of Appeals for the Eleventh Circuit can fashion for itself, and for those litigants who appear before it, such rules of judicial administration and internal operating procedures that lead to just and orderly proceedings. But it is likewise true that the United States Supreme Court, charged with supervision of the federal judiciary, is the final arbiter of such things as rules of procedural default. As we demonstrate below, this Court always requires a litigant in the direct-appeal track to raise his claims (i.e., claims for which there is precedential or other support in the law) at the first opportunity. By contrast, the Eleventh Circuit requires a litigant in the direct-appeal track to raise his claims (i.e., claims for which there is precedential or other support in the law) before they exist. The Eleventh Circuit rule is thus at odds with the clearly-expressed doctrine of this Court. It is also, as we demonstrate below, at odds with the holdings of all other federal courts of appeal; with the rules of criminal procedure; and with policy considerations that go to the heart of a just and orderly administration of federal criminal litigation.

At issue here is not merely some filigree of the doctrine of procedural default. Garland Hogan was deprived, in substantial part, of his constitutionally-protected right to trial by jury. This deprivation was not the product of a knowing, informed, and voluntary waiver. Mr. Hogan forfeited his right to trial by jury as to the amount of loss, his role in the offense, and other factors which turned what would have been a sentence of six months or less into a sentence of 28 years or more. His forfeiture of his precious Sixth Amendment rights was unknowing, uninformed, and thus involuntary. At the time he forfeited his rights to a jury determination as to sentencing factors, neither Mr. Hogan nor his lawyers (nor anyone else, for that matter) knew that such rights existed. It was only after this Court's decision in *Blakely* that Mr. Hogan and his lawyers (and everyone else, for that matter) learned of the existence of such Sixth Amendment rights. Mr. Hogan, whose case was still on direct appeal, immediately moved for relief from the court before whom his litigation then reposed – the Eleventh Circuit. That court ruled that Mr. Hogan – having asserted his claim at the very earliest opportunity – had asserted it too late, and lost it forever.

A. The Eleventh Circuit's unique rule

Before the year 2000, many circuits, including the Eleventh Circuit, frowned upon, but did not bar, the consideration of supplemental issues not presented in an initial brief. *See, e.g., McGinnis v. Ingram Equipment Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990) (recognizing that the court had discretion to allow supplemental briefing). This discretion could be exercised, for example, where there was a supervening change in law.

But all this changed after this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that the jury verdict sets the limit of the statutory maximum sentence). Thereafter, the Eleventh Circuit decided *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), which held that "parties cannot properly raise new issues at supplemental briefing, even if the issues arise based on the intervening decisions or new developments cited in the supplemental authority." In other words, the Eleventh Circuit requires that litigants make arguments that are frivolous under well-established law in order to preserve them in the event that the law may change.[4]

The issue arose again when this Court vacated an Eleventh Circuit decision and remanded it for reconsideration in light of *Apprendi*. *United States v. Ardley*, 242 F.3d 989 (11th Cir. 2001). In *Ardley*, a panel of the Eleventh Circuit held that even though the Supreme Court had remanded for reconsideration, the rationale of *Nealy* allowed the court, even on remand, to procedurally bar the defendant from raising these issues because he failed to raise them in his initial brief. 242 F.3d 989 (11th Cir. 2001). The Eleventh Circuit denied rehearing *en banc* in *Ardley*, but Judge Tjoflat dissented and took exception to the view that appellate courts can avoid applying supervening changes in constitutional law to correct an error. *Id.* at 999 n. 6 (Tjoflat, J. dissenting from the denial of rehearing *en banc*) ("[A]pplying a plain error analysis, even though it is a more narrow review, allows the court,

[4] In effect, the Eleventh Circuit rule mandates a litigant to make arguments that violate Fed. R. Civ. P. 11, which precludes any argument that is not substantiated by existing law.

in at least some instances, to implement the new constitutional rule.").

Then came *Blakely*, and even though the Eleventh Circuit had told litigants that arguments attempting to apply *Apprendi* to the Guidelines were frivolous,[5] the Eleventh Circuit applied *Nealy/Ardley* to preclude appellants from raising *Blakely* issues unless they had done so in their initial briefs. In *United States v. Levy*, 379 F.3d 1241, 1244 (11th Cir. 2004), *rehearing en banc denied*, 391 F.3d 1327 (11th Cir. 2004), the Eleventh Circuit characterized its rule barring the appellant from attempting to raise any issue not included within the initial brief as a "procedural default rule[] [that] applies neutrally to all appellants, whether the government or the defendant," which applied even in cases where there was a supervening change in law.[6] The *Levy* court recognized that the appellant was able to "cite a few decisions where this court apparently considered a new issue raised in a supplemental brief," however, *Nealy/Ardley* "preclude the raising of new issues in rehearing petitions and in supplemental and reply briefs." *Id.* at 1244. Judges Tjoflat (joined by Judge Wilson) and Barkett dissented from the denial of rehearing *en banc*.

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[5] *See United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (*en banc*) (holding that *Apprendi* did not apply to the Federal Sentencing Guidelines).

[6] *See also United States v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004) (relying on *Levy* as foreclosing supplemental briefs on new issues; *Levy* explained the "long-standing rule in this circuit, as well as in the federal rules themselves, that issues not raised by a defendant in his initial brief on appeal are deemed waived"; denying permission to file supplemental brief raising *Blakely* claim); *United States v. Hembree*, 381 F.3d 1109 (11th Cir. 2004) (motion to file supplemental brief on *Blakely* grounds deemed impermissible).

In his dissent, Circuit Judge Tjoflat explained the significant, certiorari-worthy concerns raised by the Eleventh Circuit's bar to supplemental briefing, as follows:

> The panel's decision in this case is problematic for four reasons. First, it unjustifiably limits the principle of *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708 . . . (1987), that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to *all* cases . . . pending on direct review or not yet final." *Id.* at 328, 107 S.Ct. at 716 (emphasis added). Second, by erroneously terming Levy's failure to raise a *Blakely*-type claim in his opening brief a "waiver" rather than a mere "forfeiture," the decision unduly limits our scope of review under Federal Rule of Criminal Procedure 52(b), as interpreted by the Supreme Court in *United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770 . . . (1993). Third, it continues a circuit split that finds this court standing alone. Fourth, it sends a clear message to appellate counsel that they should brief every colorable claim – even those claims that are squarely foreclosed by our own precedent – or else risk costing their clients the benefit of a favorable intervening decision.

391 F.3d at 1336-37 (Tjoflat, J., dissenting from denial of rehearing *en banc*) (footnotes omitted). Based on the *Nealy* line of cases, the Eleventh Circuit denied Mr. Hogan's petition for rehearing *en banc* and denied his motion to file supplemental briefs on the *Blakely* (now *Booker*) issue.[7]

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[7] As Judge Tjoflat explained in *Levy:* "[t]hat this was the first time that [Hogan] had advanced such a claim is certainly understandable given that this court unequivocally rejected the same argument in [a prior case]." Nevertheless, as explained *infra* at pg. 18, the Eleventh

(Continued on following page)

B. The Eleventh Circuit's procedural default rule conflicts with this Court's decisions.

This Court explained in *Booker*, 125 S.Ct. at 769, that under *Griffith v. Kentucky*, the two rules announced in *Booker* "must" be applied to "all cases" on direct review, with the only limitation that *reversibility* may hinge on the application of "ordinary prudential doctrines," such as plain error. But the Eleventh Circuit default rule writes these cases off the books.

In *Griffith v. Kentucky*, 479 U.S. at 323, the Court explained that the rule of retroactive application (to cases not yet final) of rules announced by the Court is intended to have the courts of appeals undertake the merits review that would otherwise fall to the Court's own busy docket: "As a practical matter, [because the Court does not have the resources or time to] hear each case pending on direct review and apply the new rule," the Court "fulfill[s][its] judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." The Eleventh Circuit's rule, however, says that unless the issue was raised in the initial brief, it need not apply this Court's decision in *Griffith*. As Judge Tjoflat noted in his dissent in *Levy*:

> *Griffith*'s holding is therefore clear: retroactivity extends to *all* cases still pending on direct review. There is simply nothing in the opinion to suggest that a defendant must raise the issue in his initial appellate brief in order to receive the benefit of retroactivity. To the contrary, it consistently refers to *all* cases or *all* convictions not yet final.

Circuit's rule encourages its practitioners raise all claims, even frivolous ones foreclosed by its own precedent.

> *Griffith*, 479 U.S. at 323, 324, 328, 107 S.Ct. at 713, 716.... *Griffith* therefore requires us to consider Levy's claim because *Blakely* was decided before his conviction became final.

391 F.3d at 1339 (emphasis in original).

The Eleventh Circuit's rule does violence to this Court's holdings in *Griffith* and *Booker*. It places an additional requirement, not stated in *Griffith* or *Booker*, that the appellant list issues – even if they would be frivolous at the time raised – to fall under the umbrella in *Griffith*. As Judge Tjoflat explained:

> Perhaps *Ardley* and *Levy* are only an attempt to limit the impact of the Supreme Court's recent watershed sentencing decisions. *See* Douglas A. Berman, *Do-overs?*, Sentencing Law and Policy, Aug. 4, 2004, *at* http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/doovers.html (noting that "the potential number of sentencing 'do-overs' after *Blakely* is mind-boggling" and citing *Levy* as "evidence that lower courts are going to resist 'do-overs' however they can").

Whatever its motivation, the Eleventh Circuit cannot fashion rules that contradict this Court's holdings. The *Griffith* Court explained that "the integrity of judicial review requires that [courts] apply [supervening changes in law] to all similar cases pending on direct review." 479 U.S. at 322-23, 107 S.Ct. at 713. The very judicial integrity concerns that underlie the Court's *Griffith* decision compel that *Griffith* not be eviscerated by an appellate court's adoption of a procedural default rule designed to minimize a court of appeals' workload. Because the Eleventh Circuit has placed its own rules above this Court's mandate, the petition for a writ of certiorari should be granted.

C. The Eleventh Circuit's procedural default rule conflicts with other circuits' decisions.

The Eleventh Circuit's non-discretionary rule prohibiting any panel of the court in any case from accepting the submission of authorities or argument, as to errors not raised in the initial brief due to supervening changes in governing law, conflicts with the law in every other circuit, both pre-*Booker*[8] and post-*Booker*[9] decisions. *Levy*, 391 F.3d

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[8] *See United States v. Byers*, 740 F.2d 1104, 1115 n. 11 (D.C. Cir. 1984) (Scalia, J.) (considering merits of constitutional claim raised for first time in rehearing petition where supervening decision made foreclosed argument "plausible"); *United States v. Terry*, 240 F.3d 65, 72-73 (1st Cir. 2001) (reviewing *Apprendi* claim for plain error where defendant first raised claim in supplemental brief); *United States v. Griffith*, 385 F.3d 124, 127 (2d Cir. 2004) (ordering, notwithstanding defendant's failure to raise *Blakely*-type claim in initial brief, that case be held for merits review pending *Booker* decision); *United States v. Moore*, 109 Fed. Appx. 503, 505 n. 2 (3d Cir. 2004) (unpub.) (noting that *Blakely* claim first raised in supplemental brief would be reviewed for plain error but declining to grant motion to file such brief because it was clear defendant could not establish plain error); *United States v. Hammoud*, 381 F.3d 316, 345 & n. 14 (4th Cir. 2004) (*en banc*) (appellant permitted to file supplemental brief on *Blakely* grounds); *United States v. Delgado*, 256 F.3d 264 (5th Cir. 2001) (reviewing *Apprendi* claim for plain error where defendant first raised claim in supplemental brief); *United States v. Rogers*, 118 F.3d 466, 471 (6th Cir. 1997) (rejecting government's argument that defendant "waived" claim based on then-recent Supreme Court decision by failing to object at trial or advance claim in initial brief); *United States v. Schafer*, 384 F.3d 326, 330-31 (7th Cir. 2004) (allowing supplemental brief arguing *Blakely*; remanded for resentencing); *United States v. Poulack*, 236 F.3d 932, 935-37 (8th Cir. 2001) (reviewing *Apprendi* claim for plain error where defendant first raised claim in "supplemental brief"); *United States v. Castro*, 382 F.3d 927, 929 & n. 3 (9th Cir. 2004) ("we have the authority to identify and consider such sentencing issues *sua sponte* [and] it would be appropriate for parties with pending cases to inform this court by letter at any time ... when a potential *Blakely* ... issue exists"); *United States v. Cernobyl*, 255 F.3d 1215 (10th Cir. 2001) (plain-error review of *Apprendi* claim first raised in "supplemental brief").

[9] *See United States v. Bruce*, No. 03-3110, 2005 WL 241254, *4, *16-17 (6th Cir. Feb. 3, 2005) (reviewing *Booker* claim on plain-error

(Continued on following page)

at 1343 (Tjoflat, J. dissenting) ("[I]t appears that every other circuit is willing to consider claims like Levy's despite the ordinary rule that issues not briefed are deemed waived.").

The most recent decision considering such an issue, and in direct conflict with the Eleventh Circuit, is *United States v. Washington*, 2005 WL 326986 at n.7 (4th Cir. February 11, 2005): "Although appellate contentions not raised in an opening brief are normally deemed to have been waived, *see Edwards v. City of Goldsboro,* 178 F.3d 231, 241 n.6 (4th Cir. 1999), the *Booker* principles apply in this proceeding because the Court *specifically mandated* that we 'must apply [*Booker*] . . . to all cases on direct review.' Breyer Opinion at 25." (emphasis added). This Court should resolve this Circuit split and grant the writ of certiorari.

D. The Eleventh Circuit's procedural default rule conflicts with Federal Rule of Criminal Procedure 52(b).

Federal Rule of Criminal Procedure 52(b) states: "A plain error that affects substantial rights may be considered *even though it was not brought to the court's attention*." (Emphasis added). Despite the clear wording of

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basis where issue raised for first time in supplemental brief); *United States v. Oliver*, No. 03-2126, 2005 WL 233779, *5-6 & n. 1 (6th Cir. Feb. 2, 2005) (reversing on plain-error review of *Booker* issue raised for first time in post-briefing supplemental authority letter); *United States v. Fox*, No. 03-3554, 2005 WL 195429, *7-8 (8th Cir. Jan. 31, 2005) (granting relief and remanding for resentencing under *Booker*, based on supplemental brief raising issue not addressed in initial brief); *United States v. Burgess*, No. 04-1543, 2005 WL 124523 (8th Cir. Jan. 24, 2005) (remanding in light of *Booker* based on supplemental brief raising *Blakely* issue).

this rule allowing review of issues not brought to a court's attention, the Eleventh Circuit *never* considers an issue unless it was raised in the initial brief, even if the litigant (like Mr. Hogan) raised the issue in the district court.[10] Through the artifice of labeling the failure to raise an issue that does not yet exist as a waiver, *see Levy*, 379 F.3d at 1245, the Eleventh Circuit then relies on the fact that Rule 52(b) does not apply to waived issues. The effect is that in the Eleventh Circuit Rule 52(b) has no application because every issue not brought to the court's attention is deemed to have been waived, precluding it from being considered.

At worst, the failure to raise an issue that does not exist is a forfeiture, not a waiver. "Wavier is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 732-34, 113 S. Ct. at 1777 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938)). This distinction is critically important because issues that have been forfeited can still be considered under Rule 52(b) while issues that have been waived cannot. *United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770 (1993) ("Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under 52(b).").

Here, Mr. Hogan was unaware of a Sixth Amendment right to a jury trial on his federal enhancements until *Blakely* was decided so he could not have "waived" this

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[10] This particular conflict between Rule 52(b) and the Eleventh Circuit's rule does not arise in Mr. Hogan's case because he raised and preserved the issue in the district court. Therefore, on remand he should be subject to harmless, not plain, error review under Rule 52(a).

claim. "It makes no sense to say that [Hogan] 'waived' his Blakely claim, as no such 'known right' existed when [Hogan] filed his brief." *Levy*, 391 F.3d at 1339. The *most* that can be said is that Hogan forfeited the sentencing issue by not raising it in his initial brief; under Rule 52(b), the sentencing issue may therefore be considered.[11]

The Eleventh Circuit's view that issues not raised in the initial brief cannot later be raised even if they have just been created simply cannot be squared with Rule 52(b).[12] The courts of appeals cannot ignore Rule 52(b) or penalize parties by imposing a policy of requiring parties to raise every conceivable issue as that would defeat the entire purpose of the rule.

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[11] We say at most because Mr. Hogan's case is different from the *Nealy* line of cases (and much more like the facts in *Griffith*) because Mr. Hogan actually preserved this claim in the district court.

[12] The Supreme Court has noted that Rule 52(b) codified the plain error standard laid down in *United States v. Atkinson*, 297 U.S. 157, 160 (1936). *United States v. Young*, 470 U.S. 1, 6-7 (1985). *Atkinson* held that "[i]n exceptional circumstances, *especially in criminal cases*, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." 297 U.S. at 160, 56 S.Ct. at 392 (emphasis added). In explaining the meaning of Fed. R. Crim. P. 52(b), the Supreme Court in *United States v. Olano*, 507 U.S. 725 (1993), twice quoted this very sentence in the *Atkinson* decision. *Id.*, 507 U.S. at 732, 736.

E. Policy considerations cut against the Eleventh Circuit's procedural default rule.

The Eleventh Circuit's rule will lead appellate lawyers to take one of two absurd approaches. Some appellate lawyers will list every conceivable argument in their briefs – even frivolous ones – in order to preserve them in the event that the law changes. The Eleventh Circuit's rule presents attorneys with the Hobson's choice of violating Rule 11 (by raising issues currently foreclosed by existing law) or committing malpractice by failing to preserve issues that later become important.[13]

Other appellate lawyers will take the opposite extreme position and file briefs under *Anders v. California*, 386 U.S. 738, 744 (1967), and *Ellis v. United States*, 356 U.S. 674, 675 (1958), in which they state simply that they could find no meritorious issues to appeal. Upon receipt of such a brief, the Eleventh Circuit is required to make an independent review of the record. In other words, the appellant who files an *Anders* brief one day before the Supreme Court decided *Booker* is in a better position than the litigant who files a brief raising non-*Booker* issues because the Eleventh Circuit would consider *Booker* as part of the *Anders* appeal, whereas the litigant who had raised other issues in his brief would not receive the benefit of *Booker* review. *See, e.g., United States v. Ripoli*, No. 02-4076, 2005 WL 238133, *1-2 (3d Cir. Feb. 2, 2005) (unpub.) (reviewing potential *Booker* issue as part of *Anders* review); *United States v. Fisher*, No. 03-3164, 2005 WL 271541, *1-3 (3d Cir. Feb. 4, 2005) (unpub.) (same).

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[13] In this respect, the Eleventh Circuit's desire to protect its workload may backfire, by creating *habeas* issues that would not otherwise exist.

This Court should not countenance such silly results. As Judge Tjoflat has made clear, "the rule will do great harm to the fair and efficient administration of justice in this circuit." *See Levy*, 391 F.3d at 1350 (Tjoflat, J., dissenting from denial of rehearing *en banc*). Accordingly, this Court should grant the petition for a writ of certiorari to correct this anomalous rule.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Miami, Florida

March 2005

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10368

D.C. Docket No. 99-08125-CR-DTKH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN ARROYA,

Defendant,

WANDA TIRADO,
GARLAND HOGAN,
GARY J. PIERCE,
ZANE BALSAM,
ALAN RICHARD LEWIS,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(June 24, 2004)

Before BIRCH, KRAVITCH and FARRIS* Circuit Judges.

KRAVITCH, Circuit Judge:

Wanda Tirado, Garland Hogan, Gary Pierce, Zane Balsam, and Alan Lewis (collectively "the defendants") were charged with bilking investors out of their money in a fraudulent viatical investment company scheme[1] through a company called Financial Federated Title and Trust, Inc. ("FinFed"). The defendants were indicted and convicted of various mail-fraud and money-laundering offenses; they appeal their convictions and sentences.

I. Background

A. The Defendants and FinFed

In 1996, Zane Balsam and Alan Lewis created Viatical Federated Trust Company (which was renamed "FinFed") and began the viatical investment scheme. Garland Hogan served as FinFed's in-house counsel and Wanda Tirado, Hogan's fiancee, was the company's financial director. In late January 1999, Gary Pierce became involved when his company, CSI Ag Ltd., took over FinFed.

FinFed falsely promised investors that (1) their money would be used to purchase viatical insurance benefits; (2) investors would receive a 42 percent return within 36 months if the insured died; (3) a FinFed attorney would

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[1] A viatical sale involves purchasing a beneficial interest in a life insurance policy of a terminally ill person for a percentage of the face value of the policy.

ensure that the trust and escrow facilities used in handling the investment funds met industry standards; (4) each investment was a "guaranteed receivable" from an insurance company; (5) each investment was protected by a fidelity bond; and (6) a medical overview had been performed on each of the insureds whose policies were purchased. *See United States v. Frederick Brandau*, No. 01-10497 (11th Cir. July 23, 2002) (unpublished).[2] Instead of using investors' funds to buy insurance benefits, the defendants spent the investors' money on real and personal property placed in the names of friends and family, and transferred money to other corporations to purchase properties and invest in various businesses. *Id.* In all, investors lost over $100 million. *Id.*

B. The Indictment

After the Government investigated the fraud, a grand jury returned a third superceding indictment on December 13, 2000, charging the defendants on multiple counts. Hogan, Pierce, and Lewis were charged in Count 1 with conspiracy to commit mail fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 371. Hogan was charged with mail fraud, in violation of 18 U.S.C. §§ 1341, 2, in Counts 5, 6, 7, 8, 9, 10, 11, 12, and 14, and Lewis was similarly charged in Count 13. Count 15 charged all the defendants with conspiracy to launder proceeds of illegal activity in violation of 18 U.S.C. § 1956(h).

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[2] Brandau was charged and convicted for his involvement in the same viatical settlement scheme at issue here. On appeal, this court affirmed Brandau's conviction and sentence, with one exception. The district court erred in sentencing Brandau for one count on which the jury acquitted him.

Counts 16 though 45 charged various defendants with participating in financial transactions with mail and wire fraud proceeds and with the intent to conceal or disguise the source or ownership of the proceeds, in violation of 18 U.S.C. § 1956(a)(1)(B). Hogan was charged in Count 16; Tirado in Counts 17, 20, 41, and 43; Pierce in Counts 41 and 45; Lewis in Counts 22, 23, 25, and 29; and Balsam in Counts 32, 33, 34, 35, 36, 37, 38, 39, and 40.

Hogan was also charged in Count 50, and Balsam in Count 51, for engaging in monetary transactions with mail and wire fraud proceeds of a value greater than $10,000, in violation of 18 U.S.C. § 1957. Count 52 demanded the forfeiture of all the defendants' interests in real and personal property.

C. Verdict and Sentences

On July 1, 2001, the jury returned verdicts convicting the defendants as charged. The court sentenced each defendant separately.

Balsam was sentenced to 360 months total: 120 months for Counts 15 and 51, to run concurrently; 240 months as to Counts 32-40, to be served concurrently with each other but consecutively to the 120 month sentence; 3 year concurrent terms of supervised release for each count; $50 million in restitution; a special assessment of $1,100 and forfeiture.

Lewis was sentenced to 151 months total: 60 months as to Counts 1 and 13, to be served concurrently; 91 months as to Counts 15, 22, 23, 25, and 29, to run concurrently with each other but consecutive to the sentence imposed on the previous counts; 3 year concurrent terms

of supervised release as to each count; $119 million in restitution; a special assessment of $700, and forfeiture.

Hogan was sentenced to 324 months total: 60 months as to Counts 1,5, 6, 7, 8, 9, 10, 11, and 12, to run concurrently; 120 months as to Counts 15 and 50, to run consecutive to each other and consecutive to the previously imposed sentence; 24 months as to Count 14 to be served consecutively to the other sentences; 3 year concurrent terms of supervised release as to each count; $108 million in restitution, a special assessment of $1200 and forfeiture.

Tirado was sentenced to 262 months total: 22 months as to Count 15; 240-month sentences as to each of Counts 17, 20, 41, and 43, to be served concurrently with each other but consecutive to the 22-month sentence; 3-year concurrent terms of supervised release as to each count; restitution of $90 million, a special assessment of $500, and forfeiture.

Pierce was sentenced to 240 months total: 60 months as to Count 1; 120 months as to Count 15 to be served consecutively; 60 months as to Counts 41 and 45, to be served concurrently with each other but consecutively to the previously imposed sentences; 3-year concurrent terms of supervised release as to each count; $31 million in restitution, a special assessment of $400 and forfeiture.

D. The Appeals

Each defendant appeals his or her conviction and sentence on various grounds, including: (1) all defendants appeal on the basis that there is insufficient evidence to support his or her conviction; (2) Balsam, Lewis, and

Pierce appeal the denial of their severance motions; (3) Balsam, Lewis, Hogan, and Pierce appeal various evidentiary rulings; (4) Lewis and Hogan appeal, claiming the government prejudiced the defendants by misinforming the jury concerning the confidentiality of viatical insurance documents; (5) Tirado appeals, claiming Count 15 failed to state an offense; (6) Balsam appeals the disqualification of his chosen counsel; (7) Lewis appeals the district court's denial of his post-conviction request to unseal grand jury proceedings and (8) on the grounds that the district court improperly reconstructed the record; (9) Hogan appeals, contending that his counsel was ineffective; (10) Pierce appeals the denial of his motion for the judge to recuse and (11) claims the district court failed to adequately investigate allegations of juror misconduct and, finally, (12) each defendant appeals various aspects of his or her sentence. We discuss these issues in order.

II. Discussion

A. Sufficiency of the Evidence

We review the evidence to determine whether "a reasonable jury, viewing the evidence and all reasonable inferences therefrom in the *light most favorable to the government* could find the defendants guilty as charged beyond a reasonable doubt" *United States v. Williamson*, 339 F.3d 1295, 1299 (11th Cir. 2003) (internal quotation and citation omitted) (emphasis added). That is, we affirm a jury's verdict if the jury "was rationally able to find that every element of the charged crimes was established by the government beyond a reasonable doubt." a (internal quotation and citation omitted). Because each of the defendants appeals on this ground, we discuss this issue separately for each defendant.

1. Balsam

The jury convicted Balsam on Counts 15, 32-40, and 51, which include violations of mail fraud and wire fraud statutes, intent to promote money laundering, concealing such proceeds, and engaging in transactions in criminally derived property of a value greater than $10,000.

Balsam argues that taking the evidence in the light most favorable to the government, the government did not establish that Balsam (1) joined a money laundering conspiracy, concealed its proceeds, or did financial transactions with the proceeds; (2) was an officer, employee, shareholder, signator on bank accounts, or employee of FinFed; or (3) supervised anyone at FinFed or had contact with any alleged victim.

To convict a defendant based on promotion money laundering, the government must prove beyond a reasonable doubt that the defendant engaged in the transaction "with intent to promote the carrying on of [the] specified unlawful activity." *United States v. Carcione*, 272 F.3d 1297, 1302 (11th Cir. 2001). The concealment money laundering offense, on the other hand, "was designed to punish defendants who [having committed a crime,] thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises." *United States v. Majors*, 196 F.3d 1206, 1212 (11th Cir. 1999). Thus, to convict a defendant based on concealment money laundering, the government must show that the transaction was "intended at least in part to disguise the relationship of the item purchased with the person providing the illegally obtained proceeds." *United States v. Dobbs*, 63 F.3d 391, 397 (5th Cir. 1995).

In determining whether a transaction violates money laundering statutes, we consider various factors, including statements by a defendant probative of intent, unusual secrecy surrounding the transactions, structuring the transactions to avoid attention, depositing illegal profits in the bank account of a legitimate business, and using third parties to conceal the real owner. *Majors*, 196 F.3d at 1213 n. 18.

We conclude that there was sufficient evidence to support Balsam's conviction on all counts. Balsam was Brandau's partner in FinFed and he helped purchase viaticals. The policies purchased by Balsam enabled others to assuage investors in January 1999, giving Balsam and others time to set up foreign accounts into which they deposited millions in FinFed funds. In the end, Balsam obtained over $13 million of the investors' money.

The strongest evidence against Balsam shows that he conducted sophisticated financial transactions that served no legitimate purpose and were designed to conceal the wealth he derived from investors. As noted above, this is indicative of money laundering. *Id.* Balsam established Tidal Wave Associates, Ry-Lor Technologies, and Asset Equities Limited, all Canadian corporations of which Balsam's relatives were the officers and directors. He also established ELS Group, Minute Communications, Real Time Processing, and Secure Transactions International Company, all Florida corporations, with his relatives also serving as officers and directors.

The evidence further showed that at various times between October 1996 through July 1999 Balsam funneled FinFed investor money through these corporations in order to obtain the money for himself. For example,

Balsam transferred over $6.8 million in FinFed funds to ELS *Group*. He then used ELS Group checks to purchase cashiers checks totaling $559,000. He also transferred $2 million in ELS Group funds to Ry-Lor in Canada, and then he used the money to buy a house in Boca Raton, Florida. Balsam and his relatives cashed other checks from the corporations he created, using the money to pay credit card bills and fund payroll distributions to relatives. He also purchased a Mercedes with a FinFed check in 1997, a Lotus with a FinFed check in 1999, and a Bentley with a FinFed check in 1999.

After reviewing all the evidence, we conclude that there is no merit to Balsam's arguments that he did not knowingly join a money laundering conspiracy and that he did not knowingly conceal the proceeds. Thus, we affirm the jury verdict convicting Balsam of each count[3]

2. Lewis

Lewis argues there was insufficient evidence to establish that he had the requisite knowledge of illegality or intent for the jury to find him guilty, particularly on Counts 1 and 13. Count 1 alleged conspiracy to commit mail fraud, and Count 13 alleged a specific act of mail fraud – that Lewis made a Federal Express shipment from FinFed to Harald Roelle, a German investment advisor, on

[3] We also note that there was sufficient evidence to convict Balsam of Count 51, which alleges a violation of 18 U.S.C. § 1957 – essentially engaging in a monetary transaction with criminally derived property of value greater than $10,000. On February 28, 1999, Balsam issued a check for $200,000 to Performance Marine, a boat business. The payment was made to sponsor the race boat, and the boat bore the names of Balsam's companies.

December 18, 1996, in furtherance of the fraud and in violation of 18 U.S.C. § 1341 and 2 (committing fraud through the mail or by private interstate carrier). In addition to those Counts, Lewis appeals his conviction of conspiracy to launder money (Count 15) and his conviction for conducting specific financial transactions with the intent to conceal or disguise the nature or ownership of the proceeds (Counts 22, 23, 25, and 29).

In order to prove a conspiracy in general, "the government must have shown beyond a reasonable doubt, if only by circumstantial evidence, that a conspiracy existed, that [the defendant] knew of it and that he intended to associate himself with the objective *of* the conspiracy." *United States v. Browning*, 723 F.2d 1544, 1546 (11th Cir.1984) (internal quotation and citation omitted).

To prove a conspiracy to commit wire or mail fraud, the government must show (1) an agreement between two or more people, (2) to execute a scheme to defraud, and (3) the use of either the mails or wire service in furtherance of the scheme. *United States v. Ross*, 131 F.3d 970, 981 (11th Cir. 1997). Participation in a conspiracy may be inferred from circumstantial evidence. *See United States v. Delgado*, 903 F.2d 1495, 1500 (11th Cir. 1990). The inferences must be reasonable and must not be mere speculation. See *United States v. Perez-Testa*, 36 F.3d 1552, 1557 (11th Cir. 1994).

Lewis asserts that no reasonable trier of fact could have found him guilty beyond a reasonable doubt. Lewis notes that the "only" evidence against him with respect to his knowledge was "(1) his prior involvement with Brandau and Balsam; (2) his wife's viatical investments which were not initially backed by policies; (3) his assurance to Roelle that

policies existed; (4) a $15,000 loan from Lewis to Hefflin [sic] at Pensco see infra footnote 9]; (5) his letter assuring Pensco there were policies; and (6) the amount of money involved.", *Lewis* Brief at 29-30 (summarizing Record 1578:9226-38).

First, this evidence alone is significant and may provide a reasonable inference that Lewis was guilty beyond a reasonable doubt But we need not consider this issue with only the above evidence, because there is significant other evidence, including that Lewis (1) knew the policies did not exist, (2) lied by telling David Kligfield, an insurance agent, that he saw insurance policies in order to calm the investors' concerns, and (3) funneled FinFed investor money to obtain money, cars, and real estate for himself In regard to funneling money for his personal benefit, Lewis bought a Mercedes and boat by having checks directly issued to vendors, a $380,000 home in the Florida Keys in the name of Lewis Limited Partnership, a $230,000 lot in Gulfstream in his wife's name, and a $105,000 vacation home in Sweden in his wife's name. He bought the Swedish borne with currency carried out of the United States in amounts under $10,000 to avoid filing currency transaction reports. Lewis also set up other companies with bank accounts in other countries into which he deposited nearly $300,000 in FinFed funds between September 1998 and January 1999. And, he did not declare all of his income on his 1998 federal tax returns.

As stated above in discussing Balsam's appeal, we consider various factors in determining whether a defendant laundered money, including statements by a defendant probative of intent, unusual secrecy surrounding the transactions, structuring the transactions to avoid attention,

depositing illegal profits in the bank account of a legitimate business, and using third parties to conceal the real owner. *Majors*, 196 F.3d at 1213 n.18. Here, the government showed that the above factors applied to Lewis's transactions. From this evidence, a reasonable jury could find that Lewis was involved in an agreement with other people to execute the scheme to defraud FinFed investors. Therefore, we affirm the jury's verdict on all counts.

3. Hogan

Hogan was convicted on Counts 1, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 50, and 52. These Counts included allegations of mail and wire fraud, money laundering, and engaging in transactions in criminally derived property of a value greater than $10,000. In his appeal, Hogan argues that proof of guilt was legally insufficient because the facts and law upon which the government urged a finding of guilt are incorrect and the government failed to provide substantial proof of Hogan's knowledge and intent. Hogan specifically asserts that the government wrongly claimed Hogan lied before the grand jury. Because of this error, Hogan contends the government could not show he had the requisite knowledge or intent.

Even if we assume Hogan was truthful before the grand jury,[4] there was sufficient evidence to find him

[4] There is sufficient evidence, however, that Hogan lied to the grand jury, including his statements that he received copies of the viatars' policy assignment with policy numbers, that he reviewed policies, and that he routinely reviewed medical reports and documents from insurance companies listing policy numbers and viators' names. There is also evidence that he lied to the jury when he stated that he

(Continued on following page)

guilty on each Count. Proof of Hogan's knowledge and participation in the fraud and money laundering offenses was grounded on his extensive contributions to the design and administration of the fraud. In February 1998, Hogan lied to insurance agents when he claimed that he personally reviewed policies to ensure that they were suitable for investment, that beneficial interests had been transferred to FinFed, and that disability waivers had been identified. In 1999, Hogan misled insurance agent David Kligfeld and investor James Tracton by among other things, stating that he saw the policies behind their investments. In September 1999, Hogan admitted to the FBI that he had never seen insurance policies or medical reviews signed by physicians.

Most important, Hogan demonstrated his knowledge and involvement in the scheme when he deposited a $116,513.95 FinFed check into his bank account, in violation of 18 U.S.C. § 1957, as charged in Count 50, and also in violation of the money laundering statutes charged in Count 15. Hogan does not address this evidence in his appeal.

Again, we note that we review this evidence to determine whether "a reasonable jury, viewing the evidence and all reasonable inferences therefrom in the *light most favorable to the government* could find [Hogan] guilty as charged beyond a reasonable doubt." *Williamson*, 339 F.3d at 1299 (internal quotation and citation omitted) (emphasis added). Reviewing the evidence in that light, we

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had seen originals and photocopied policies and documents certifying FinFed's beneficial interests in life insurance policies.

conclude that a reasonable jury could find Hogan guilty on each Count and affirm the jury's verdict.

4. Pierce

Pierce was convicted on Counts 1, 15, 41, 45, and 52, These counts involve conspiracy to commit mail fraud, conspiracy to launder money, and participating in financial transactions with mail and wire fraud proceeds with the intent to conceal the nature of such proceeds. Like the other defendants, Pierce's major contention is that the evidence was insufficient to convict him on these counts. But, unlike the other defendants, Pierce only became involved with FinFed in January 1999.

Although Pierce's involvement began later than that of the other defendants, substantial evidence still supports his conviction. Pierce got involved in FinFed when his company took it over early in 1999. Later in 1999, Pierce sent a "lulling letter" to investors falsely claiming his company (CSI) was a billion dollar company when it took over FinFed. Pierce told an investor, Theodore Pace, that he reviewed the policies behind FinFed's investments. Pierce hired an attorney, Thomas Sclafani, to write a letter in August 1999 to the United States Attorney General claiming that CSI possessed gold bearer bonds that would provide more than enough funds to pay investors. Pierce subsequently wrote to investors, claiming CSI was a multibillion dollar conglomerate holding title to six gold mines in South America, and that the CSI takeover would have no adverse effect on any FinFed investment.

Pierce also participated in financial transactions that were designed to conceal the source of the fraud proceeds,

and he obtained nearly $1.6 million in investors' funds. Pierce and Brandau opened two accounts in the name of CSI at Suisse Security Bank and Trust in the Bahamas in which they deposited about $5 million from FinFed and other companies. From May through October 1999, Pierce transferred nearly $1.4 million from the Suisse account to relatives and friends. From April through September 1999, Pierce spent approximately $130,000 from a business account on jewelry, restaurants, and hotels.

Reviewing the evidence in the light most favorable to the government, we conclude that a reasonable jury could find Pierce guilty of each Count and therefore, we affirm the jury's verdict.

5. Tirado

Tirado was convicted on Counts 15, 17, 20, 41, 43, and 52. These counts involve conspiracy to launder money and participation in financial transactions with mail and wire fraud proceeds with the intent to conceal the nature of such proceeds. Tirado argues that the evidence is insufficient to show (1) she had the requisite knowledge to be found guilty and (2) to prove concealment.

We disagree. Tirado controlled FinFed's financial records and was in the best position to know of the fraud. Moreover, she was directly involved in the fraud by using FinFed funds for *her* own benefit. Because of Tirade's role at FinFed, she was in position to know that the company purchased few viatical policies. Scott Page even told Tirado that FinFed's investor files lacked documents necessary to collect on policies, and that there was no indication that Brandau had purchased policies. Furthermore, Tirade could

not explain FinFed's investment management procedures to Page.

The strongest evidence against Tirado includes the financial transactions that she conducted, which were designed to conceal the receipt and spending of investors' money. Tirado sent FinFed funds directly to car dealers to buy cars for Brandau and Balsam. She distributed FinFed funds to Juan Arroyo, her brother, and Luis Cruz, her cousin. Tirado sent a $256,000 check to her brother, which she did not include in the company records given to the government, and she even sent a FinFed check to Luis Cruz for over $200,000, and falsely categorized it as a company expense. These funds were used to pay Tirado's credit card bills and to purchase real estate for her and her parents. In addition, she wired $180,000 from the Bahamas to her brother's account to purchase-a house. Finally, Tirado admits failing to report much of her income to the IRS. Although the government did not charge her with that crime here, this was further evidence of her intent to conceal the proceeds of the fraud.

After reviewing this and other evidence in this case, we conclude that a reasonable jury could find Tirado guilty on all Counts.

B. Denial of Severance

Balsam, Lewis, and Pierce maintain that the district court erred in failing to grant their motion for severance. A district court may grant a severance of defendants if "it appears that a defendant or the government is prejudiced by a joinder." Fed. R Crime P. 14. We review the denial of a motion for severance for abuse of discretion. *United States v. Adams*, 1 F.3d 1566, 1578 (11th Cir. 1993).

Appellants must show specific and compelling prejudice to the defense in order for this court to reverse a conviction based upon denial of a motion to sever. *United States v. Schlei*, 122 F.3d 944, 983-84 (11th Cir. 1997). Prejudice may result from defendants' antagonistic or mutually exclusive defenses. *United States v. Rucker*, 915 F.2d 1511, 1513 (11th Cir. 1990).

Each defendant asserts that he had no knowledge of the fraudulent activities associated with FinFed and that the spillover effect of not severing the trial was too great, with co-defendants supposedly. "in the know." See *Kotteakos v. United. States*, 328 U.S. 750 (1946) (trying defendants together in a complex case with markedly different degrees of culpability increases the risk of prejudice). This court, however, "is reluctant to reverse a district court's denial of severance, particularly in conspiracy cases, as generally persons who are charged together should also be tried together." *United States v. Knowles*, 66 F.3d 1146, 1158 (11th Cir. 1995) (quotation omitted). As previously discussed, the activities of the defendants were greatly intertwined, and the "success" of the fraud was the result of each defendant's role at FinFed. Moreover, the Government produced sufficient evidence to demonstrate that each appellant was a member of the scheme to defraud investors.5 In addition, the district court sufficiently mitigated any possible resulting prejudice by giving a

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[5] Pierce, in particular, contends that the court should sever him from the other defendants because day-to-day activity at FinFed was of no relevance to Pierce because he did not enter the conspiracy until February 1999. We hold that this is not a sufficient reason to sever Pierce from the other defendants. Even though Pierce's involvement began later, the evidence shows that he was greatly involved in the fraud, as discussed above in Section A.

limiting instruction to the jury regarding its use of certain evidence as it was introduced, and gave a final instruction that the jury must analyze the evidence against each defendant individually as to each count. For these reasons, we hold that the district court did not abuse its discretion by not severing the trials.

C. Evidentiary Rulings

Balsam, Lewis, and Pierce also argue that the district court erred by admitting certain evidence. Decisions on the admissibility of evidence are reviewed under an abuse of discretion standard. *Schlei*,122 F.3d at 980.

First, Balsam contends that the district court erred when it admitted an $80,000 check from FinFed to Elizabeth Novy, a United Benefits Group (UBG) investor.[6] Balsam argues that the payment was not admissible because no prior notice was given pursuant to Fed. R. Evid 404(b) and the payment was not inextricably intertwined with the instant charges. The district court, however, admitted the evidence under Federal Rule of Evidence 801, as an admission of a party opponent, and subsequently applied Fed. R. Evid. 403 to determine that under that rule the payment's probative value outweighed its prejudicial value. The district court noted that the payment was directly related to the issue of whether Balsam and Brandau paid Novy with FinFed funds as part of the money laundering conspiracy. Because Novy did not invest through FinFed, it would have been improper to pay her

[6] In 1994, Zane Balsam managed UBG. Balsam purchased viatical policies from another company and sold them to UBG clients. Soon after, UBG dissolved, and in 1996 Balsam and Lewis created FinFed.

with funds obtained from FinFed investors. For this reason, we hold that the district court did not abuse its discretion by admitting this evidence.

Second, Pierce claims that the district court erred by allowing Thomas Sclafani to testify because Sclafani previously represented Pierce.[7] Pierce objected to much of Sclafani's testimony, but the district court ruled that the door had been opened by the defense to matters which otherwise would have been covered by the attorney-client privilege, and it determined that the crime-fraud exception applied because Sclafani was paid to facilitate the fraud.

The crime-fraud exception to the attorney-client privilege applies if the government makes a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice, followed by evidence that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it. *In Re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir. 1987).

Although Pierce argues that there is no evidence that Sclafani knew of the scheme at the time of his representation, a lawyer's knowledge of the scheme is not relevant to whether the crime-fraud exception applies. *See* Fla. Stat. § 90.502 (stating that "[t]here is no lawyer-client privilege

[7] Sclafani represented Pierce beginning in July 1999. Sclafani testified, *inter alia*, that he (1) wrote a letter to the Attorney General and the United States Attorney on behalf of Pierce, (2) Brandau had told him that viaticals existed and that Brandau saw those policies, and (3) Pierce told him that additional money for attorneys' fees would come from a loan taken against the interest the company had in a gold mine.

under this section when: (a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud."). Thus, even if the district court found Sclafani assisted the fraud without knowledge of it, the court did not err in applying the crime-fraud exception because Sclafani's knowledge of the scheme is irrelevant. The district court found that Pierce obtained Sclafani's services in order to perpetuate the fraud, and that is the important point.[8]

Finally, Lewis argues that the district court erred by (1) allowing lay witnesses, including Scott Page of Page and Associates, to offer testimony on the intricacies of the viatical business,[9] and (2) admitting evidence concerning a $15,000 loan that Lewis made to Heflin.[10]

If a witness is not testifying as an expert, the witness may still testify to his or her opinion if "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within

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[8] Because the crime-fraud exception applies, we need not determine whether the defense opened the door to the statements obtained by the government from Sclafani.

[9] Page and Associates was a viatical settlement company that sold viatical policies to FinFed in 1998. In December of 1998, FinFed offered to acquire Page and Associates but after Scott Page met with Tirado and Hogan, Page became suspicious of FinFed's operations. He subsequently stopped selling viaticals to FinFed and rejected its acquisition offer.

[10] Heflin was the Vice President of a company called PENSCO Pension Services, an IRA custodian. In 1997, Lewis oversaw fund transfers of investments to FinFed from PENSCO.

the scope of Rule 702." Fed. R. Evid. 701. The testimony here satisfies that standard. When such testimony is based on first-hand knowledge or observation and is helpful in resolving issues in a case, the trial judge does not err in admitting this testimony under Fed. R. Evid. 701. See Fed. R. Evid. 701 advisory committee note; *United States v. Gold*, 743 F.2d 800, 817 (11th Cir. 1984). Thus, the district court did not abuse its discretion by admitting this testimony.

Lewis also contends that his right to a fair trial was violated when the district court admitted evidence concerning Lewis's loan to Heflin in violation of Fed. R. Evid. 404(b).[11] According to Lewis, the loan insinuated an improper payback from Lewis to Heflin and suggested that Lewis's prior employer, UBG, engaged in a similar type of viatical fraud. The district court, however, found that the loan was probative of Lewis's intent to persuade Heflin to continue to authorize the investment of PENSCO-controlled funds into FinFed viaticals in the event that Heflin discovered FinFed was under investigation. The loan was made on October 25, 1998, several months after FinFed was served with the first grand jury subpoena.

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[11] Under Fed. R. Evid. 404(b)

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge; identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Thus, we do not agree that the distract court erred in admitting this evidence.

D. Government Conduct

Lewis and Hogan claim the government acted inappropriately by, *inter alia*, misinforming the jury concerning the confidentiality of viatical insurance documents. Lewis and Hogan claim that the identities of the insured, in this case individuals diagnosed as HIV positive, were confidential and exempt from public records laws. Therefore, employees of FinFed, including Lewis and Hogan, had no reason to believe that the policies did not exist when they were not shown actual policies. Lewis notes that even the Government's witness, William Page, testified that it was bad practice to disclose names of viators to the investors. Lewis and Hogan claim that the prosecutor's repeated misrepresentations to the jury concerning confidentiality law prevented them from receiving a fair trial.

Factors used to determine whether prosecutorial misconduct violated a defendant's due process rights include: (1) the degree to which challenged remarks have a tendency to mislead the jury and prejudice the accused; (2) whether they are isolated and extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) strength of competent proof to establish the guilt of the accused. *Davis v. Zant*, 36 F.3d 1538, 1546 (11th Cir. 1996). After considering these factors and analyzing the record, we hold that the Government was not guilty of prosecutorial misconduct. The defense's main point – that aspects of the viatical policies were confidential – does not negate that high level FinFed employees should have known that the policies did not exist. At trial, the Government

focused on the fact that confidentiality laws did not prevent FinFed employees from examining that the insurance policies underlying the investments FinFed sold to its customers. Thus, we hold that the Government did not commit prosecutorial misconduct.[12]

E. Validity of Count 15

Count 15 charged various defendants, including Tirado, with a conspiracy to conduct or attempt to conduct financial transactions "with the intent . . . to conceal or disguise the nature, source or ownership of such proceeds . . . and to engage in monetary transactions in criminally derived property of a value greater than $10,000." Tirado contends that this does not state all the elements of money laundering because laundering requires knowledge "that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership or control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i) (emphasis added). Put simply, Tirado argues that Count 15 alleges only "intent to conceal money" which is not sufficient to show "intent to design a transaction to conceal money" in violation of the statute.

We disagree. An indictment is sufficient if it: (1) sets forth the elements of the offense in a manner that fairly informs the defendant of the charge against which she must defend and (2) enables her to enter a plea that will

[12] The defendants also alleged other prosecutorial misconduct, including that prosecutors misstated other evidence, made improper credibility arguments, and failed to correct false testimony. After reviewing the record, we conclude that these claims are meritless.

bar future prosecution for the same offense. *United States v. Fairer*, 321 F.3d 1024, 1028 (11th Cir. 2003) (internal quotation and citation omitted). Conviction of conspiracy to launder money and to money launder under 18 U.S.C. § 1956 only require that a defendant knowingly enter into a financial transaction with the proceeds of unlawful activity with the intent to conceal or disguise the source or ownership of the proceeds. *United States v. Tokars*, 95 F.3d 1520, 1539 (11th Cir. 1996). After carefully reviewing Count 15,[13] we hold that it satisfies the Poirer standard because Count 15 adequately sets forth the elements of the offense and enabled Tirado to enter a plea that will bar future prosecution for the same offense. See *Poirer*, 321 F.3d at 1028.

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[13] Count 15 states that various defendants (including Tirado) did knowingly combine, conspire, confederate and agree with each other and with others known and unknown to the Grand Jury to commit offenses against the United States, that is, to conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, which involved the proceeds of a specified unlawful activity, that is, mail fraud and wire fraud, in violation of Title 18, United State Code, Sections 1341 and 1343, knowing the property involved represented the proceeds of some form of unlawful activity, with the intent to promote the carrying on of said unlawful activity in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i); to conceal or disguise the nature, source, or ownership of such proceeds, in violation of Title 18 United States Code Section 1956(a)(1)(B); and to engage in monetary transactions in criminally derived property of a value greater than $10,000, which property was derived from wire fraud, in violation of Title 18, United States Code, Section 1957; all in violation of Title 18, United States Code, Section 1956(h).

F. Disqualification of Balsam's Counsel

Attorney Norman Malinksy had defended several corporations and people connected with the fraud, including Brandau and Hogan. Balsam subsequently hired Malinski to serve as his defense attorney and Balsam agreed to waive any conflict pertaining to Malinski. The Magistrate Judge, however, recommended that the district court reject Appellant's waiver of conflict, and the district court eventually adopted the recommendation.

We review the district court's decision for abuse of discretion. *United States v. Register*, 182 F.3d 820, 828 (11th Cir. 1999). Although there is a presumption in favor of the defendant's choice to waive the right of conflict-free representation, this presumption may be overcome by a demonstration of actual conflict or by a showing of a serious potential for conflict. *Wheat v. United States*, 486 U.S. 153, 164 (1988). In this case, Malinsky represented other defendants involved in the fraud, the other defendants would not waive the conflict posed by Malinski's former representation of them, and Malinski was even a witness at trial. These factors demonstrate sufficient actual conflict or serious potential conflict to overcome the defendant's choice to waive the right of conflict-free representation. Therefore, the district court did not abuse its discretion in denying Balsam his choice of counsel.

G. Sealed Grand Jury Proceedings

Federal Rule of Criminal Procedure 6(f) requires that "the indictment shall be returned by the grand jury, or through the foreperson or deputy foreperson on its behalf, to a federal magistrate in open court." The district court refused Lewis's motion to unseal the grand jury transcript

of the presentment of the third superseding indictment, and Lewis contends that this court therefore must presume that the indictment was not presented in compliance with Rule 6(f).

We review the district court's decision for abuse of discretion. *United Kingdom v. United States*, 238 F.3d 1312, 1318-21 (11th Cir. 2001). Findings related to the allegations of a particularized need are subject to the clearly erroneous standard of review. *United States v. Burke*, 856 F.2d 1492, 1496 (11th Cir. 2002).

With limited exceptions, the disclosure of grand jury materials must be authorized by the court. See Fed.R.Crim.P. 6(e)(2), (3). In light of the benefits of maintaining the secrecy of grand jury proceedings, "disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, . . . the burden of demonstrating this balance rests upon the private party seeking disclosure." *Douglas Oil Co. v. Petrol Stops* Northwest, 441 U.S. 211, 223, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). Under this Court's precedent, in order to obtain disclosure of protected grand jury materials, a person must show a "particularized need" for them. *United States v. Cole*, 755 F.2d 748, 758-59 (11th Cir. 1985) (citing *United States v. Tucker*, 526 F.2d 279, 282 (5th Cir. 1976)). To show particularized need, parties seeking grand jury materials "must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only the material so needed." *Douglas Oil*, 441 U.S. at 221-22, 99 S.Ct. 1667 (holding that the requesting party must demonstrate that without the

requested materials "a defense would be greatly prejudiced or . . . an injustice would be done").

Here, Lewis claims that the record surrounding the return and presentment of the Third Superceding Indictment is inadequate. He asserts a good faith belief that his rights under the law were violated in regard to the indictment and sought an. order unsealing the proceedings conducted when the indictment was returned and presented to the court. The court denied Lewis's request and Lewis maintains that it must be presumed that the indictment was not presented in open court. Lewis, however, did not show any particularized need by making a general allegation that such materials were necessary to prepare a motion to dismiss, *United States v. Elliot*, 849 F.2d 554, 557 (11th Cr. 1988), or by making unsubstantiated allegations. *Cole*, 755 F.2d at 759. Therefore, the district court did not err on this ground.

H. Reconstructed Record

Lewis contends that he is entitled to a new trial because several portions of the trial transcript, specifically key portions of redacted Grand Jury testimony read to the jury, were not transcribed and are missing from the record on appeal. A new trial may be granted only if the defendant can show that failure to record and preserve a specific portion of the trial visits a hardship on him and prejudices his appeal. *United States v, Charles*, 313 F.3d 1278, 1283 (11th Cir. 2002). A reconstructed record not identical to the original trial transcript still provides an appellant with due process so long as it can afford effective appellate review of issues raised on appeal. *Id.*

The part of the transcript missing here is a section in which the court reporter was allowed to rest rather than transcribe the redacted grand jury testimony, After Lewis objected to the court's failure to transcribe this material, the judge explained that the lines and pages would be dictated into the record, and Lewis did not object again. We hold that the record reconstructed by the district court was adequate to remedy any deficiencies that resulted from the court reporter's failure to transcribe portions of the grand jury testimony, Therefore, the district court did not err here.

I. Effectiveness of Hogan's Counsel

Generally, we do not consider claims of ineffective assistance of counsel on direct appeal, because there usually has been insufficient opportunity to develop the record regarding the merits of these claims. *United States v. Andrews*, 953 F.2d 1312, 1327 (11th Cir. 1992). There is an exception to this rule if the record is sufficiently developed. *Id.* After reviewing the record, however, we hold that it is not sufficiently developed in order to consider Hogan's claim. Such a claim may be resolved in a 28 U.S.C. § 2255 proceeding, where an evidentiary hearing may be held. *Id.*

J. Pierce's Motion for Recusal

"Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). A judge's refusal to recuse himself is reviewed under the abuse of discretion standard. *Jaffree v. Wallace*, 837 F.2d 1461, 1465 (11th Cir. 1988).

Pierce claims that Judge Hurley, the trial judge, abused his discretion by denying Pierce's motion to recuse because Judge Hurley presided over Brandau's trial. At Brandau's trial Judge Hurley filed a Notice of Court's Intention to Consider Upward Departure from Sentencing Guideline Range based on Brandau's perjurious testimony. Because Brandau would be called as a witness in this trial, Pierce contends it would be difficult for Judge Hurley to remain impartial regarding the truthfulness of Brandau's testimony.

The test under Section 455(a) is whether an objective, disinterested, lay observer fully informed of the facts on which recusal was sought would entertain a significant doubt about the judge's impartiality. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988). A judge's impartiality must also "be personal and extrajudicial; it must derive from something other than that which the judge learned by participating in the case." *McWhorter v. City of Birmingham* 906 F.2d 674, 678 (11th Cir. 1990). Alleged bias that is judicial in nature rather than personal, may not serve as a basis for a recusal motion, *McWhorter*, 906 F.2d at 678, nor do a judge's rulings in the same or a related case serve as such a basis. *Jaffe v. Grant* 793 F.2d 1182, 1188-89 (11th Cir. 1986).

After reviewing the transcript in this case, we are not persuaded that the record reflects any bias or prejudice by Judge Hurley. Because this was a jury trial, Judge Hurley was not responsible for evaluating the credibility of witnesses, including Brandau. Thus, even if Judge Hurley had any bias against Brandau, we conclude that it would have been harmless. For these reasons, the district court did not abuse its discretion by denying Pierce's motion to recuse.

K. Alleged Juror Misconduct

Towards the end of the trial, the court announced that two jurors approached the courtroom deputy, stating that another juror, Irving Dick, told them he had read about the case in an article. Dick stated that he had read an article in the February issue of Consumer Reports, which dealt with the viatical industry in general, and that he reread it recently. He stated that he could not remember whether the article mentioned the fraud, that it did not affect his ability to fairly evaluate the case, and that he had not told any juror about the content of the article. The court excused Dick and asked if any other juror participated in any conversation in which any person discussed what they read about the case. The jurors indicated in the negative.

Pierce argues that the district court should have further inquired as to the extent of the contamination of the Juror Dick's acts. Because Pierce failed to move for mistrial on this issue, we review for plain error. *United States v. Hansley*, 54 F.3d 709, 715 (11th Cir. 1995).

The district court has broad discretion to choose the investigative procedure in checking for jury misconduct, although allegations concerning outside influences must be fully investigated to determine if misconduct occurred and whether it was prejudicial. *United States v. Harris*, 908 F.2d 728, 733-34 (11th Cir. 1990). Here, the district court excused Dick from the jury and ascertained that Dick had not discussed the article. The other jurors confirmed that fact. Dick only mentioned that he had read an article but that he did not discuss the article's substance. Thus, we hold that the district court did not clearly err in its handling of the juror's actions.

L. Sentencing

With respect to Sentencing Guideline issues, this court reviews purely legal questions de nova, a district court's factual findings for clear error, and, a district court's application of the Guidelines to the facts with "due deference." *United States v. White*, 335 F.3d 1314, 1317 (11th Cir. 2003).

1. Balsam

Balsam appeals his sentence on five grounds, arguing: (1) his base offense level should have been 3-levels lower by using U.S.S.G. § 2S1.1(a)(2) instead of U.S.S.G. § 2S1.1(a)(1) for the base offense level; (2) he should only have received a 7-level "relevant conduct" enhancement for $3.7 million in the fraud, rather than an 11-level enhancement for $50 million; (3) he should not have received a 4-level increase for a supervising role; (4) he should not have received a 2-level increase for vulnerable victims; and (5) he should not have received a 2-level increase for multiple-victims. We address each ground in order.

a. Base Offense Level

Balsam contends his base offense level was calculated incorrectly. In Count 15, Balsam was charged with three separate objects – promotion money laundering, concealment money laundering, and engaging in transactions with criminally derived property in amounts in excess of $10,000, in violation of 18 U.S.C. § 1957. The jury returned a

general verdict of guilty.[13] Balsam contends that the district court erred by using the "promotion" money laundering and fraud guidelines in computing his sentence whereas the Guidelines specifically state the crimes for which he was charged and convicted call for using the "concealment" money laundering guideline.

When the jury returns a general verdict, "the district court must find beyond a reasonable doubt that the defendant conspired to commit a particular object offense before the court can sentence the defendant on the basis of that offense." *United States v. Farese*, 248 F.3d 1056, 1060-61 (11th Cir. 2001); *United States v. Venske*, 296 F.3d 1284, 1293-94 (11th Cir. 2002) (noting the court plainly erred by failing to determine beyond a reasonable doubt which money laundering offense was the object of the conspiracy).[14]

Here, Balsam concedes that the district court concluded beyond a reasonable doubt that Balsam violated 18 U.S.C. § 1956(a)(1)(A)(i). *See Balsam* Brief at 56 (noting that "the Balsam court did go through this analysis"). Thus, the district court complied with the rules in *Farese*

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[13] Balsam claims that he was charged with violating 18 U.S.C. § 1956(a)(1)(B), not 18 U.S.C. § 1956(a)(1)(A) and, therefore, the court erred by applying the base offense level associated with 18 U.S.C. § 1956(a)(1)(A). This is incorrect because the indictment specifically charges Balsam under 18 U.S.C. § 1956(a)(1)(A)(i).

[14] Balsam argues that under *United States v. Riley*, 142 F.3d 1254, 1257 (11th Cir. 1998), this court should not apply the "beyond a reasonable doubt" standard here. Riley applied the lesser "preponderance of the evidence" standard. Applying that standard here, however, would only lower the bar for the district court, making it easier for the district court to sentence Balsam under the "promotion" guidelines.

and *Venske* and did not err in sentencing Balsam under the "promotion" guidelines.

b. Relevant Conduct

According to the district court, Balsam was responsible for (1) Brandau's payments of over $33 million to "insiders" and other business related costs at FinFed; (2) insurance policy purchases of $7 million; and (3) Brandau's expenditures of $14 million. This totaled over $54 million, which the court reduced to $50 million. Balsam claims that his relevant conduct should only consist of the $3.7 million listed in the indictment, or, in the alternative, $12 million that Balsam received from FinFed, because he had nothing to do with other transactions.

The district court, however, may hold "participants in a conspiracy responsible for the losses resulting from the reasonably foreseeable acts of co-conspirators in furtherance of the conspiracy." *United States v. Dabbs*, 134 F.3d 1071, 1082 (11th Cir. 1998); *see also United States v. Rayborn*, 957 F.2d 841, 844 (11th Cir. 1992) ("[A]ll losses caused by fraud or deceit which are governed by ... § 2F1.1 may be imputed to a defendant who was a member of the conspiracy which caused those losses."). As discussed above, the district court had sufficient evidence to find Balsam responsible for other laundering transactions that were in excess of $50 million. The district court found that "the activities of Brandau and others in making payments to insiders, in making payments to investors so they wouldn't blow the whistle ... , in making all those expenditures that were made with illegal proceeds that

were over $10,000, all of that was certainly foreseeable, and all of it was within the scope of the criminal activity that was agreed to by Mr. Balsam in which he agreed to undertake." Because participants in a conspiracy can be held accountable for the foreseeable acts of their co-conspirators, we hold that the district court did not err in holding Balsam responsible for laundering over $50 million.[15]

c. Supervisory Role

Balsam received a 4-level enhancement at sentencing for the role of "organizer or leader" pursuant to U.S.S.G. § 3B1.1, According to the guideline, "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels." U.S.S.G. § 3B1.1. According to *United States v. Alred*, 144 F.3d 1405, 1421 (11th Cir. 1998), this court considers various factors that would distinguish mere management or supervision from an

[15] Balsam also makes a related argument – that he should also not be liable for $50 million in restitution because restitution is inappropriate for a money laundering conviction. We disagree. Under 18 U.S.C. § 3663A, restitution is mandatory where the defendant is convicted of "any . . . offense against property under [Title 18], including any offense committed by fraud or deceit . . . in which an identifiable victim or victims has suffered a . . . pecuniary loss." *United States v. Paradis*, 219 F.3d 22, 24 (1st Cir. 2000) (citing 18 U.S.C. § 3663A(c)(1), § 3663A(a)(1)). Like *Paradis*, Balsam does not dispute that money laundering is an offense against property committed by fraud or deceit. *See* 18 U.S.C. § 1956(a)(1) ("Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts . . . a financial transaction . . . ") (emphasis added). A "victim" under the statute is "a person directly and proximately harmed as a result of the commission of an offense for which restitution maybe ordered. . . . " 18 U.S.C. § 3663A(a)(2).

organizational and leadership role, including "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others."

The district court specifically "found as a finding of fact . . . that Mr. Balsam was, in fact, an organizer of criminal activity. He worked in tandem with Fred Brandau to develop the overall criminal activity and to develop the forms and other representations that would be made to induce people to invest in this – in the product that was being offered." In addition, the court found that the criminal activity involved more than five or more participants and noted that the criminal fraud scheme was otherwise extensive because it "utilized a vast network of salespeople, advertised through the media, and it operated in various parts of the United States and outside the United States."

We agree. First, Balsam's involvement satisfies the factors in *Alred* for having an organizational and leadership role in committing this crime. Second, even if Balsam was not involved with five other participants, as he claims, the scheme was still otherwise extensive, as noted by the district court. Therefore, after reviewing Balsam's role in the offense, we conclude that he was an organizer and leader under U.S.S.G. § 3B1.1, and the district court did not err in applying that enhancement.

d. Victim Enhancements

The district court applied a 4-level increase for the large number of vulnerable victims in this case. The district court's determination of a victim's vulnerability is essentially a finding of fact, to which we give due deference. *United States v. Gonzalez*, 183 F.3d 1315, 1326 (11th Cir. 1999). The guidelines define a "vulnerable victim" as anyone who is unusually vulnerable to criminal conduct due to age or physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct. U.S.S.G. § 3A1.1, comment. n.2. A vulnerable victim adjustment focuses chiefly on the conduct of the defendant, and should be applied only where the defendant selects his victim due to the victim's perceived vulnerability to the offense. *United States v. Frank*, 247 F.3d 1257, 1259-60 (11th Cir. 2001).

Balsam argues that the district court erred in granting the Government's motion for an upward departure based on the "vulnerable victim" and "multiple victims" enhancements because (1) Balsam had no notice the government would ask for an upward departure, (2) money laundering is a victimless crime under the Guidelines, and (3) the 1998 Guidelines have no enhancement for multiple victims.

After reviewing the record, we uphold the enhancement. First, Balsam had notice of the motion for upward departure because the Government specifically asked the court to consider an upward departure. When the motion was addressed, Balsam did not object on that ground. Second, the crime here was not victimless. The evidence showed that the scheme promised high returns, and minimal risk, making it particularly attractive to seniors

looking to invest their retirement assets without risking their fixed income. As discussed in Issue A, there was sufficient evidence to support the finding that this scheme took advantage of many people, especially seniors due to their age and their particular financial situation. *See* U.S.S.G. § 3A1.1, cmt. n. 2. These investors lost a substantial amount of money from the fraud. Although harm from money laundering transactions "does not generally fall upon an individual, but falls upon society in general." *United States v. Martin*, 320 F.3d 1223, 1227 (11th Cir. 2003) (internal quotation and citation omitted), this rule did not preclude the district court from applying an enhancement here given the circumstances.

Finally, even though the 1998 Sentencing Guidelines do not specifically address multiple victim enhancements, the district court may apply such an enhancement under U.S.S.G. § 5K2.5, which allows an upward departure if the offense caused loss not taken into account within the Guidelines. Thus, it was within the district court's discretion to apply the 4-level increase to Balsam's offense level for the large number of victims involved.

2. Lewis

a. Base Offense Level and Victim Enhancements

Lewis initially contends (1) that the district court erred by sentencing him using the "promotion" money laundering and fraud guidelines, even though the jury returned a general verdict, and (2) the district court erred by imposing a 4-level vulnerable victim enhancement. After reviewing the record, we affirm Lewis's sentence on these grounds for the same reasons given in affirming Balsam's sentence.

b. Mass Marketing Enhancement

The district court also enhanced Lewis's sentence under U.S.S.G. § 2F1.1(b)(3), which provides that an offense committed through mass-marketing allows for a 2-level increase. Application Note 3 defines mass-marketing as "a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons . . . to invest for financial profit." Lewis contends that the enhancement "does not state that a large number of people must actually be defrauded by the mass-marketed fraudulent actions." This argument has no merit. Lewis does not dispute the district court's finding that the fraud was "a thought out, carefully orchestrated campaign involving numbers, numbers of sales people aimed at soliciting both by telephone, mail, placing ads in the newspaper and so on to get people to invest for financial profit, for financial gain." Therefore, we affirm this enhancement.

c. Relocation and Sophistication Enhancement

Finally, Lewis appeals the district court's 2-level enhancement under U.S.S.G. § 2F1.1(b)(5), which provides for a 2-level increase if "the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials . . . [or] the offense otherwise involved sophisticated means." The district court found that the government established both prongs – that the company moved its locations from one physical location to another in order to avoid state regulators, and that the offense otherwise involved sophisticated means.

Lewis contends that he did not knowingly participate in any scheme operating outside the United States and never relocated. The offense otherwise involved sophisticated means, however, and that is sufficient to support the enhancement.

3. Hogan

Hogan challenges the court's enhancing his sentence for targeting vulnerable victims, abusing a position of trust, and having a supervising role.

a. Vulnerable Victim Enhancement

We affirm this enhancement for the reasons stated above in Balsam's appeal.

b. Position of Trust Enhancement

A 2-level enhancement applies if the defendant abused a position of trust. *See* U.S.S.G. § 3B1.3 (applying enhancement if the "defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense"). "Although attorneys are expected to abide by ethical standards, it simply is not the case that an attorney holds a position of trust with respect to all people with whom he comes into contact solely by virtue of his status as an attorney." *United States v. Morris*, 286 F.3d 1291, 1297 (11th Cir. 2002) (noting other examples of holding a position of trust including having an attorney-client relationship with a victim or using one's powers as an attorney to commingle funds).

> For this enhancement to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

U.S.S.G. § 3B1.3 comment. n.1.

As discussed in Issue A, Hogan assisted in drafting FinFed's promotional literature, and in the literature assuring investors that there were interests in identifiable policies that would be purchased with the investor's funds. The investors relied upon Hogan's role as an attorney because he promised to personally confirm the existence of the policy underlying the investment as well as the accuracy of medical information. He also assured particular investors, including James Tracton, that he had seen the policies underlying his investments and information from physician reports. Overall, the district court found that "he acted in a way to induce reliance by these people." Thus, the district court did not err in finding that Hogan contributed in some significant way to facilitating the commission or concealment of the offense through a position of trust.

c. Supervisory Role Enhancement

U.S.S.G. § 3B1.1 provides for a 3-level increase if the defendant was a manager or supervisor, and the criminal activity involved five or more participants or was otherwise extensive. To qualify for this enhancement, the defendant must have been the manager or supervisor of one or more other participants. U.S.S.G. § 3B1.1, comment. n.2. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. U.S.S.G. § 3B1.1, comment. n.1. In turn, a person is "criminally responsible" if he "commit[s] all of the elements of a statutory crime with the requisite mens rea." *United States v. Badaracco*, 954 F.2d 928, 934-35 (3d Cir. 1992). "[J]ust as a party who knowingly assists a criminal enterprise is criminally responsible under principles of accessory liability, a party who gives knowing aid in some part of the criminal enterprise is a 'criminally responsible party' under the Guidelines." *United States v. Hall*, 101 F.3d 1174, 1178 (7th Cir. 1996).

Here, the district court specifically found that "the Government has established by a preponderance of the evidence that Mr. Hogan was a supervisor. He supervised Donnell Johnson in particular and Reginald Darbonne, and [the court found] that both of those people qualify as participants as defined by the commentary to the guidelines and as further elucidated by [United States v. Bapack]."

After carefully considering all the evidence, including the testimony of Johnson and Darbonne, we note this issue is a close call. In order to reverse the district court on this issue, however, we would have to conclude that the district court clearly erred in making its finding that Johnson and

Darbonne were participants. *White*, 335 F.3d at 1317. We do not, however, conclude that to be the case. Thus, we affirm this enhancement.

4. Pierce

Pierce appeals his sentence solely on the ground that the district court erred in imposing a vulnerable victim enhancement. We affirm this enhancement for the reasons stated above in Balsam's appeal on this issue.

5. Tirado

a. Base Offense Level

Tirado was charged in Count 15 with three separate objects of promotion money laundering, concealment money laundering, and engaging in transactions with criminally derived property in amounts in excess of $10,000, in violation of 18 U.S.C. § 1957. Like Balsam, Tirado contends that the district court erred by sentencing her for using the "promotion" money laundering and fraud guidelines, when the Guidelines specifically state the crimes for which she was charged and convicted call for using the "concealment" money laundering guideline. We hold that the district court did not err in calculating Tirado's base offense level for the same reasons we affirmed the district court's calculations of Balsam's offense level.

b. Relevant Conduct

Tirado also contends that she was unfairly held accountable for $6.8 million that FinFed spent to purchase insurance policies. This increased the total "promotion

amount" from approximately $34.6 million to $41.4 million, resulting in an increase of one offense level. Tirado argues that it is illogical to include money actually spent to buy insurance policies because that was a lawful activity and was not part of the fraud. The district court, however, found that the fraud was furthered by this expenditure because it was done "for the sole and exclusive purpose of preventing discovery of the fraud, erecting a facade to deter the FBI and Grand Jury that was looking into it, and so there were absolutely purposeful criminal acts aimed at furthering the massive fraud that was in existence." Because the district court found that the policies were acquired as part of the scheme, we conclude that the district court did not err by including the $6.7 million spent on policies in the amount for which Tirado was held accountable.

III. Conclusion

For the reasons stated above, we AFFIRM the convictions and sentences of Wanda Tirado, Garland Hogan, Gary Pierce, Zane Balsam, and Alan Lewis.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10368-AA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WANDA TIRADO,
GARLAND HOGAN,
GARY J. PIERCE, *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Dec. 17, 2004)

ORDER:

Appellants' motions to adopt are GRANTED.

Appellants' motions for supplemental briefing are DENIED. *See U.S. v. Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001); *U.S. v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001); *U.S. v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).

Appellee's motion to strike Appellant Lewis' supplemental authority is GRANTED. *See U.S. v. Blasco*, 702 F.2d 1315, 1332 n. 28 (11th Cir. 1983).

Appellants' motions to rehear and reverse and remand for resentencing are DENIED.

/s/ Phyllis A. Kravitch
UNITED STATES CIRCUIT
JUDGE

United States District Court
Southern District of Florida
WEST PALM BEACH DIVISION

UNITED STATES OF AMERICA

v.

GARLAND HOGAN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 9:99CR08125-001

(Filed Apr. 25, 2002)

Counsel For Defendant: Benson Weintraub, Esq.
Counsel For The United States: AUSA Steven Carlton
Court Reporter: Pauline Stipes

The defendant was found guilty on Count 1, 5 through 12, 14, 15 and 50 of the Third Superseding Indictment on July 11, 2001. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	DATE OFFENSE CONCLUDED	COUNT
18 U.S.C. § 371	Conspiracy to commit wire and mail fraud.	August 31, 1999	1
18 U.S.C. § 1341	Mail fraud	October 23, 1998	5 through 12 and 14
18 U.S.C. § 1956(h)	Conspiracy to commit money laundering.	September 30, 1999	15
18 U.S.C. § 1957	Money laundering.	December 4, 1998	50

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:
261-17-6565
Defendant's Date of Birth:
February 21, 1956
Deft's U.S. Marshal No.:
53629-004

Defendant's Mailing Address:
Palm Beach County Jail
3228 Gun Club Road
West Palm Beach, FL 33406

Defendant's Residence Address:
Palm Beach County Jail
3228 Gun Club Road
West Palm Beach, FL 33406

Date of Imposition of Sentence:
April 1, 2002

/s/ Daniel T. K. Hurley
DANIEL T. K. HURLEY
United States District Judge

April 24, 2002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 324 months. This term of imprisonment consist of a term of 60 months as to Count 1 and Counts 5 through

12 of the Third Superseding Indictment, to be served concurrent with each other but consecutively to all other Counts; 24 months as to Count 14 of the Third Superseding Indictment, to be served consecutively to all other counts; and 120 months as to each of Counts 15 and 50 of the Third Superseding Indictment, to be served consecutively to each other and consecutively to all other counts.

The Court recommends to the Bureau of Prisons:

The term of imprisonment be served at the Federal Correctional Institution at Coleman, Florida, and the defendant be permitted to participate in the 500 hour drug/alcohol rehabilitation program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This term of supervised release consists of a term of 3 years as to each of Counts 1, 5 through 12, 14, 15 and 50 of the Third Superseding Indictment, all to be served concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;
7. the defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall maintain full time, legitimate employment and not be unemployed for a term of more than 30 days, unless excused by the United States Probation Officer. Further, the defendant shall provide documentation including, but not limited to paystubs, contractual agreements, W-2 Wage and Earnings Statements, and other documents requested by the United States Probation Officer.

The defendant shall not be engaged in any business that offers securities, investments, or business opportunities to the public. The defendant is further prohibited from engaging in telemarketing, direct mail or national advertising campaigns for business purposes without the permission of the United States Probation Officer.

The defendant shall obtain prior approval from the United States Probation Officer before entering into any self-employment.

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the United States Probation Officer.

The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the United States Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$1,200.00	$	$108,947,157.73

The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18

U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
As identified by the bankruptcy trustee.	$108,947,157.73	$108,947,157.73	

The Court has determined that the defendant does not have the ability to pay interest, and it is ordered that:

the interest requirement is waived for the restitution.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A lump sum payment of **all criminal monetary penalties** is due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of

the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment and restitution is payable to the U.S. COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment and restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

The defendant shall forfeit the defendant's interest in the following property to the United States:

The defendant is ordered to forfeit the property enumerated in the attached preliminary order of forfeiture which was entered on July 17, 2001.

Payments shalt be applied in the following order; (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10368-AA

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

JUAN ARROYA,

Defendant,

WANDA TIRADO,
GARLAND HOGAN,
GARY J. PIERCE,
ZANE BALSAM,
ALAN RICHARD LEWIS,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion ___, 11th Cir., 19___, ___F.2d ___).

(Filed Dec. 17, 2004)

Before: BIRCH, KRAVITCH and FARRIS*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT
JUDGE

*Honorable Jerome Ferris, United. States Circuit Judge for the Ninth Circuit, sitting by designation.

Appellants' motions to rehear and reverse and remand for resentencing are DENIED.

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT
JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 99-8125-Cr-HURLEY/Johnson(s)(s)(s)

UNITED STATES OF AMERICA,

Plaintiff,

-versus-

GARLAND HOGAN,
GARY J. PIERCE,
CSI AG, LTD.,
RAPHAEL R. LEVY,
AMERICAN BENEFITS | SERVICES,
JEFFREY A. PAINE,
WANDA TIRADO,
ALAN RICHARD LEWIS,
IVAN BURGOS,
ZANE BALSAM,
JUAN ARROYO,
HARVEY BRANDAU, and
CHERYL POINDEXTER

Defendants. /

18 U.S.C. § 371
18 U.S.C. § 1341
18 U.S.C. § 1956
18 U.S.C. § 1957
18 U.S.C. § 982
18 U.S.C. § 2

THIRD SUPERSEDING INDICTMENT

(Filed Dec. 13, 2000)

The Grand Jury charges that:

INTRODUCTORY ALLEGATIONS

At all times relevant and material to this indictment:

1. Viatical settlements are the purchase of life insurance policies or their benefits at a discounted rate from a terminally ill person. The beneficial interest in the insurance policies purchased is sold or re-assigned to an investor. A viatical investor receives the full benefits when the ill person dies.

2. On or about January 23, 1996, Viatical Federated Title And Trust Incorporated was caused to be incorporated in the State of Florida. The corporate formation fees were paid by VANE BALSAM. John J. Rassulo was listed as the initial Director, President, Vice President, Treasurer and Secretary. On or about May 31, 1996 the name of this corporation was changed to Financial Federated Title & Trust, Inc., ("Financial Federated"). The name change fees were paid by HARVEY BRANDAU.

3. Viatical Asset Management was a Florida corporation formed on or about August 10, 1995, by Frederick C. Brandau. On or about May 23, 1996, Viatical Asset Management changed its name to Asset Base Management. At some time between May 24, 1996 and December 16, 1997, the exact date being unknown to the grand jury, Asset Base Management, Inc. was administratively dissolved by the State of Florida.

4. On or about December 17, 1997, Frederick C. Brandau, caused an application for reinstatement to be filed for Asset Base Management, changing its business address from 9720 NW 3rd Manor. Sunrise, Florida to 5317 Lake Worth Road, Lake Worth, Florida, the business offices of RAPHAEL LEVY.

5. On or about December 31, 1997, an amendment to the articles of incorporation were filed for Asset Base Management replacing Frederick C. Brandau as the sole director, President, Secretary and Treasurer, with RAPHAEL R. LEVY. On or about February 6, 1998, RAPHAEL R. LEVY signed and caused a 1998 annual report to be filed for Asset Base Management, Inc. listing a person known to the grand jury as the President, Secretary, Treasurer and sole director of the company.

6. American Benefits Services, Inc., ("ABS"). was incorporated in the State of Florida on or about May 13, 1997. JEFFREY A. PAINE was listed as the registered agent, and RAPHAEL R. LEVY as the corporation's sole director.

7. On or about July 29, 1997, Frederick C. Brandau caused a person known to the grand jury to form ASSET SECURITY CORPORATION, ("ASSET SECURITY"). in the State of Florida. John J. Rassulo was listed as the initial Director, President, Vice President, Treasurer and Secretary.

8. On or about November 4. 1997 Frederick C. Brandau incorporated VIATICAL ASSET RECOVERY CORP., ("VARC"), in the State of Florida. John J. Rassulo was listed as the initial Director, President, Vice President, Treasurer and Secretary.

9. From at least as early as February, 1996, Viatical Asset Management, Asset Base Management, and later ABS operated as viatical settlement brokerage companies engaged in the business of locating investors who would purchase interests in viatical settlements. ABS obtained investor funds through a network of independent insurance agents and financial consultants. Prior to January, 1998, Viatical Asset Management, Asset Base Management, and ABS did not use an attorney or escrow agent to hold investor funds. Beginning in February, 1998, however, investor funds were funneled from ABS to the escrow agent, and then to Financial Federated.

10. In connection with its viatical settlement brokerage business ABS used one or more participation disclosure documents that described the viatical settlement program it was offering for sale to investors. The participation

disclosure documents made specific material representations in writing to potential investors.

11. Through the participation disclosure document, ABS represented to investors that it had established a relationship with two distinct independent Trust & Escrow Companies referred to as the Financial Escrow Agent and the "VIB" (Viaticated Insurance Benefits) Trust Company.

12. Beginning at least as early as February 15. 1996. Financial Federated served as the escrow agent for ABM. After January, 1998, JEFFREY A. PAINE, an attorney licensed to practice law in the State of Florida, with an office in West Palm Beach, acted as the Financial Escrow Agent for ABS.

13. Financial Federated acted as the VIB Trust Company used by ABS.

14. From a date beginning shortly after their formation, the exact date being unknown to the grand jury, both Financial Federated and ASSET SECURITY were beneficially owned and managed by Frederick C. Brandau.

15. CSI Ag, Ltd., (hereafter "CSI"), was an international business company beneficially owned by defendant GARY J. PIERCE.

16. From at least as early as February, 1996 and continuing through approximately August, 1999, the exact dates being unknown to the grand jury, in Palm Beach County, in the Southern District of Florida and elsewhere, the defendants,

GARLAND HOGAN,
GARY S. PIERCE,
CSI, Ag. Ltd.,
RAPHAEL R. LEVY,
AMERICAN BENEFITS SERVICES, INC.,
JEFFREY A. PAINE,
ALAN RICHARD LEWIS

and others known and unknown to the grand jury, did knowingly, willfully and unlawfully devise and intend to devise a scheme and artifice to defraud and for obtaining money and property from investors throughout the United States by means of false and fraudulent pretenses. representations and promises, well knowing that the pretenses, representations and promises would be and were false and fraudulent when made.

17. The defendants, Frederick C. Brandau, GARLAND HOGAN, RAPHAEL R. LEVY, AMERICAN BENEFITS SERVICES, ALAN RICHARD LEWIS, and JEFFREY A. PAINE, together with other persons known and unknown to the grand jury, by means of false and fraudulent pretenses, representations, and promises which they knew to be false and fraudulent when made, caused and induced persons to send personal checks, bank checks, wire transfers or money orders to Financial Federated, AMERICAN BENEFITS SERVICES, INC., or companies associated with them, and thereby enabled the defendants and others known to the grand jury to defraud monies from investors throughout the United States.

OBJECT OF THE SCHEME AND ARTIFICE TO DEFRAUD

18. The object of the scheme and artifice to defraud was that the defendants, together with others known and

unknown to the Grand Jury, would unlawfully enrich themselves by knowingly and willfully making false and fraudulent representations and promises, and by knowingly and willfully omitting and concealing material facts from prospective investors, thereby fraudulently inducing them to send personal checks, bank checks, wire transfers or money orders to Financial Federated, Viatical Asset Management, Asset Base Management, AMERICAN BENEFITS SERVICES, INC. and the Escrow Agent, in the total amount of at least $117,000,000 via the United States mails or via interstate courier such as, Federal Express.

MANNER & MEANS OF EXECUTING THE SCHEME TO DEFRAUD

19. Under false and fraudulent pretenses Frederick C. Brandau, and defendants, GARLAND HOGAN, RAPHAEL LEVY, and JEFFREY C. PAINE, together with other persons known and unknown to the grand jury participated in recruiting and educating insurance agents to solicit investors in viaticated insurance policies. GARLAND HOGAN and JEFFREY C. PAINE participated in one or more of these meetings in which it was falsely represented that they were verifying the existence of actual insurance policies underlying the viatical investments when in truth and in fact no such verification was performed.

20. GARLAND HOGAN, RAPHAEL R. LEVY, AMERICAN BENEFITS SERVICES, and ALAN RICHARD LEWIS represented to investors that:

(a) investor funds obtained by American Benefits Services and Financial Federated would be used to purchase viaticated insurance benefits;

(b) as a result of Financial Federated or an affiliated company purchasing the viaticated insurance benefits with the investor's money, the investor was guaranteed a 42% rate of return within 36 months on his or her investment if the insured party died;

(c) individual investors were told in writing that an attorney would be utilized to ensure that the methods and documentation used by both trust and escrow services apply well established industry underwriting criteria;

(d) the defendants caused to be represented to individual investors that a viaticated insurance policy, or a partial interest in such a policy in fact had been purchased with the investor's funds;

(e) the defendants caused to be represented to individual investors that a medical overview had been performed on the insured party;

(f) ABS provides a 'title of ownership' to each investor from Financial Federated, which purported to be a "guaranteed receivable from the insurance Company;"

(g) ABS represented to investors that RAPHAEL R. LEVY "had distinguished himself in the service of the U.S. by serving in the INS" and that this business had been formed in 1988;

(h) the investment participation was "low risk" because investors' monies were "secured by $300,000 State Insurance Guaranty Fund:"

(i) the investment participation was "low risk" because investors' monies were "Secured by a Guaranteed Insurance Industry Receivable;"

(j) ABS and Financial Federated represented to investors that their investment was protected by a Fidelity Bond issued by Preferred National Insurance Company.

21. The defendants knew that the above-described material factual representations were false and fraudulent when made because:

(a) while over $117 million in investor funds were transferred to Financial Federated for the primary purpose of purchasing insurance policies, less than $6 million was actually used to purchase policies whose combined face value totaled less than $7 million, and the vast remainder of such monies was used to fund commissions for ABS and Financial Federated employees, and to purchase real and personal property around the United States that had nothing to do with the viatical business;

(b) a guaranteed 42% rate of return would have required a total face value of approximately $166 million in life insurance policies to have been purchased with investor funds of $117 million, and Financial Federated and an affiliated company purchased policies whose combined face value was approximately $7 million;

(c) the defendants knew that the methods and documentation used by the "escrow agent" for ABS, did not comply with any established underwriting criteria. Specifically, the defendants knew that the only documents Financial Federated provided to the escrow agent were an in evocable

assignment of trust benefits, a "Confirmation of Conditions for Funding", and a Federal Express shipping label. The defendants knew that none of these documents provided sufficient information to enable an investor to verify independently that insurance benefits had been purchased by Financial Federated;

(d) the defendants knew that Financial Federated had not purchased sufficient viaticated insurance benefits because they had spent approximately $6 million to purchase policies whose face value was approximately $7 million.

(e) Financial Federated fraudulently represented that medical reviews were being conducted on insured persons, when in truth and in fact Financial Federated did not conduct medical reviews;

(f) the defendants knew that the irrevocable assignment of trust benefits was not a "guaranteed receivable from the Insurance Company." The defendants knew that 90% of the investors' funds had been used to buy real and personal property and pay professional commissions, and not insurance policies. Accordingly, the defendants knew that the vast majority of the assigned "trust benefits" were worthless. and not a 'guaranteed receivable' since most investors had no underlying insurance policy securing their investment.

(g) RAPHAEL R. LEVY knew he had never worked for the Immigration and Naturalization Service, ("INS"), and he also knew that ABS had not been incorporated in the State of Florida until 1997;

(h) the $300,000 State Insurance Guaranty Fund did not provide any protection whatsoever to any investor against investment fraud;

(i) the investment participation was not "low risk" because most investors' monies were not secured by any life insurance policies;

(j) the Fidelity Bond issued by Preferred National Insurance Company was designed to protect an employer from employee theft, was never designed to function as a liability policy for investors, and in any event the bond coverage was limited to only $250,000 per employee;

22. Defendants RAPHAEL R. LEVY and JEFFREY A. PAINE also knowingly, intentionally and fraudulently caused investors to send money to ABS by representing that investors' funds would be deposited directly with PAINE as the "Financial Escrow Agent" for the sole purpose of securing viaticated insurance benefits, and that the investors' monies received by PAINE would not be disbursed by him until the existence of the insurance policies had been confirmed. In truth and in fact, JEFFREY A. PAINE did not verify the existence of actual insurance policies, but merely rubber stamped records that were provided to him by Financial Federated.

23. Defendant GARY J. PIERCE also knowingly, intentionally and fraudulently caused numerous investors and other persons known to the grand jury to be lulled into inaction or otherwise delay possible recourse against Financial Federated TITLE & TRUST by causing intentionally false and misleading information to be published and sent by the United States mails or interstate courier to the investors. These communications were intentionally

and fraudulently designed to lull investors into the belief that their respective investments were safe.

24. GARY J. PIERCE and others known to the grand jury represented in a mailed communication to the investors that:

(a) CSI had made every effort to provide the government with information pertinent to their investigation;

(b) CSI, through Gary J. Pierce, had invited the federal authorities to negotiate a solution beneficial to all parties, but that the government had not responded.

25. GARY J. PIERCE knew that the above-described material factual representations were false and fraudulent when made because:

(a) CSI and Pierce had not taken all measures to cooperate with the authorities but instead had evaded process. Pierce also had falsely and fraudulently represented to the Federal Bureau of Investigation, ("FBI"), and others known to the grand jury that he caused to be sent subpoenaed insurance policies to the FBI, when in truth and in fact he had not;

COUNT 1

CONSPIRACY TO COMMIT MAIL FRAUD

26. The allegations of paragraphs one through twenty-five are realleged and incorporated herein by reference.

27. From at least as early as February, 1996, and continuing through approximately August, 1999, the exact dates being unknown to the grand jury, at Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

GARLAND HOGAN,
GARY J. PIERCE,
CSI Ag Ltd.,
RAPHAEL R. LEVY,
AMERICAN BENEFITS SERVICES, INC.,
JEFFREY A. PAINE, and
ALAN RICHARD LEWIS,

did knowingly and willfully combine, conspire, confederate, agree and reach a tacit understanding with each other and with other persons known and unknown to the Grand Jury to commit offenses against the United States:

(a) to knowingly and willfully devise a scheme and artifice to defraud and to obtain money and property from investors by means of false and fraudulent pretenses, and representations, as more fully set forth at paragraphs one through twenty above, and to knowingly use and cause to be used the United States mails, and private or commercial interstate carriers for the purpose of executing the scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1341; and

(b) to knowingly and willfully devise a scheme and artifice to defraud and for obtaining money and property from customers throughout the United States by means of false and fraudulent pretenses, representations and promises, as more fully set forth at paragraphs one through nineteen above, and, for the purpose of executing the scheme and artifice to defraud, to transmit and cause to be transmitted in interstate commerce by means of wire

communications, certain signals and sounds, in violation of Title 18, United States Code, Section 1343.

OVERT ACTS

28. In furtherance of the conspiracy, and to effect its aims and objects, one or more of the co-conspirators committed at least one of the following overt acts in the Southern District of Florida:

a. The mail and wire communications set forth hereafter at Counts 2 through 14 are incorporated herein and further alleged as though stated herein as individual overt acts done in furtherance of the conspiracy.

b. The acts of corporate formation and amendment described in paragraphs 2, 3, 4, 8 and 9 are incorporated herein and further alleged as though stated herein as individual overt acts done in furtherance of the conspiracy.

c. On or about January 8, 1996, Frederick C. Brandau caused Box 418 to be rented at a remote mail business known as Mailbox Plus in the name of Viatical Asset Management. The address assigned to Box 418 was Suite 418, 10117 W. Oakland Park Blvd., Sunrise, FL.

d. In or about November, 1996, RAPHAEL R. LEVY solicited a prospective investor known to the grand jury.

e. In or about January, 1997, RAPHAEL R. LEVY provided to a viatical investor known to the grand jury a copy of a ~~Farmer's New World~~ [TRAVELERS INSURANCE COMPANY /s/ DBK 12-13-00] insurance policy that purportedly had been caused to be purchased by American Benefits Services.

f. In or about May, 1997, RAPHAEL R. LEVY met with a prospective investor known to the grand jury.

g. In or about July, 1997, Frederick C. Brandau met with William Ramsay for the purpose of recruiting him to lure prospective investors in viatical settlements.

h. In or about August, 1997, Frederick C. Brandau falsely represented to William Ramsay that Financial Federated was buying its viaticated insurance polices from a company known as Kelco in the State of Kentucky.

i. On various dates between March, 1996 and March, 1998, Frederick C. Brandau caused FEDERATED FINANCIAL to issue checks to the order of "VAM or Fred Brandau" in an amount totaling at least $880,000, most of which were cashed by Frederick C. Brandau.

j. Frederick C. Brandau caused Suite 418, 10117 W. Oakland Park Blvd., Sunrise, FL, to be listed with the State of Florida as the address for Viatical Asset Recovery Corporation in 1998.

k. On or about January 1, 1998, the exact date being unknown to the grand jury, Frederick C. Brandau participated with persons known and unknown to the grand jury, in re-writing a Participation Disclosure document under the name of American Benefits Services, Inc., and Asset Base Management.

l. On various dates between on or about June 18, 1997 through on or about October 20, 1998, Frederick C. Brandau caused more than $1.1 million in checks to be issued to Mad Dog Hawgs, a motorcycle dealership in Crystal River, Florida. The $1.1 million was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

m. On various dates between on or about September 22, 1997, through on or about March 23, 1999, Frederick C. Brandau caused more than $29,000,000 in checks and or wire transfers from the Financial Federated checking accounts at Union Bank to be deposited into a checking account in the name of ASSET SECURITY at First Union Bank. The $29,765,000 was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies. None of the funds in the ASSET SECURITY checking account were used to purchase insurance policies.

n. On various dates between on or about January 30, 1997, through on or about October 12. 1998. Frederick C. Brandau caused more than $1.1 million in checks from the Financial Federated checking account at Union Bank to be issued to B.C.N.U., Inc., a corporation that operated a Ft. Lauderdale restaurant doing business as East Coast Burrito Factory. The $1.1 million was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

o. On various dates between on or about February 6, 1998, through on or about March 23, 1999, Frederick C. Brandau caused more than $750,000 in checks from the Financial Federated checking account at Union Bank to be issued to Cornerstone, a Monroe County, Florida, construction business for work unrelated to viaticated insurance policies. The $750,000 was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

p. On various dates between on or about September 18, 1996, through on or about March 18, 1999, Frederick C. Brandau caused approximately $7,054,139.55 in checks

from the Financial Federated checking account at Union Bank to be issued to E.L.S. Group, for purposes other than buying viaticated insurance policies. The $7,054,139.55 was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

q. On or about August 11, 1997, Frederick C. Brandau caused a check for approximately $100,000 from the Financial Federated checking account at Union Bank to be issued to Internet Access Company for purposes other than buying viaticated insurance policies. The $100,000 was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

r. On various dates between on or about January 28, 1998, through on or about September 10, 1998, Frederick C. Brandau caused approximately $41,000 in checks from the Financial Federated checking account at Union Bank to be issued to Islamorada Elevator Company for elevator work in Monroe County, Florida, unrelated to viaticated insurance policies. The $41,000 was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

s. On or about March 26, 1998, RAPHAEL R. LEVY met with a prospective viatical investor known to the grand jury.

t. On or about January 26, 1999, Frederick C. Brandau caused a check for approximately $85,630 from the Financial Federated checking account at Union Bank to be issued to Lotus Motorsports, Inc., for purchasing a luxury sports car titled in the name of a relative and not for the purpose of buying viaticated insurance policies.

The $85,630 was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

u. On various dates between on or about July, 1997, and January, 1999, Frederick C. Brandau caused numerous checks totaling at least $146,000 to be issued to Major Motorcar, Inc., and Major Muscle, Inc., Pompano, Florida automobile businesses, for purposes other than buying viaticated insurance policies. The $146,000 was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

v. On various dates between on or about July, 1997, and July, 1998, Frederick C. Brandau caused numerous checks totaling at least $100,000 to be issued to Harley Davidson of Ft. Lauderdale, a motorcycle dealership, for purposes other than buying viaticated insurance policies. The $100,000 was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

w. On various dates between on or about December 24, 1998, and February, 1999, Frederick C. Brandau caused checks totaling at least $955,746, to be issued to Palm Beach Motorcars for the purpose of buying Lotus and Aston Martin luxury automobiles for his friends and relatives, which purchases were totally unrelated to the business of buying viaticated insurance policies. These monies were originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

x. In or about June, 1998, in St. Lucie County, Florida. Frederick C. Brandau. and GARLAND HOGAN, RAPHAEL LEVY, JEFFREY PAINE and others known

and unknown to the grand jury attended a meeting with numerous insurance agents for the purpose of promoting the activities of Financial Federated.

y. In or about October, 1998, in Ft. Lauderdale, Florida, Frederick C. Brandau, RAPHAEL LEVY, GARLAND HOGAN, and others known and unknown to the grand jury, attended a meeting with persons known and unknown to the grand jury for the purpose of promoting the activities of Financial Federated.

z. On various dates between on or about June, 1996, and March, 1999, Frederick C. Brandau caused checks totaling at least $560,000 to be issued to Pensco Pension Services, Inc. for commissions and partial investor distributions in connection with investments directed to Financial Federated through Pensco Pension Services, Inc.

aa. On various dates between on or about August, 1997, and February, 1999, Frederick C. Brandau caused checks totaling at least $917,000 to be issued to Performance Marine, a Pompano, Florida, boat dealer for the purpose of making an investment totally unrelated to buying viaticated insurance policies. The $917,000 was originally derived from investor funds received by Financial Federated.

bb. On various dates between on or about October, 1997, and March, 1999, Frederick C. Brandau caused checks totaling at least $535,000 to be issued to Phoenix Productions, for purposes totally unrelated to buying viaticated insurance policies. The $535,000 was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies

cc. On various dates between on or about July, 1998, through November, 1998, Frederick C. Brandau caused checks totaling at least $245,000 to be issued to Steven G, for home decorating services totally unrelated to buying viaticated insurance policies. The $245,000 was originally derived from investor funds received by Financial Federated to purchase viaticated insurance policies.

dd. On various dates between on or about March 9, 1998, and October 20, 1998, GARLAND HOGAN signed numerous documents entitled "Confirmation of Conditions for Funding" for investors personally certifying that a partial interest in one or more life insurance policies issued by various insurance companies had been purchased, that a medical overview had been conducted on the insured person, and that the insurance policy was "pas contestation." The "Confirmation" documents signed by Hogan pertained to the following investors amongst others: Edward and Roberta Kligfeld, William H. Warren, Lawrence and Joan Davidson, Arlene Barbush, Irving and Eva Benett, Robert May, and Scott May.

ee. In or about September, 1999, the exact date being unknown to the grand jury, GARY PIERCE had a meeting in Ft. Lauderdale, Broward County, with an investor known to the grand jury.

ff. Between August 12, 1997, and March 11, 1999, GARLAND HOGAN received approximately $2,947,133 in checks and wire transfers issued from Financial Federated.

gg. On or about May 1, 1998, Frederick C. Brandau hired an employee known to the grand jury to work at ASSET SECURITY.

hh. On or about February 12, 1999, Frederick C. Brandau caused a document containing a list of trust numbers to be telefaxed from the Hilton Business Center, Burbank, CA to GARLAND HOGAN in Ft. Lauderdale, FL.

ii. On or about April 1, 1999, Frederick C. Brandau caused a document containing a list of trust numbers to be telefaxed from Fiji to GARLAND HOGAN in Ft. Lauderdale, FL.

jj. On or about June 15, 1999, GARY J. PIERCE falsely and fraudulently represented to persons known to the grand jury and to an FBI agent that he had caused two packages to be forwarded from CSI to the FBI consisting of insurance policies previously subpoenaed from FREDERICK BRANDAU and entities controlled by BRANDAU.

kk. On or about December 18, ~~19996~~[1996 /s/ DBK 12-13-00], ALAN LEWIS caused a communication to be made with Harald Roelle in Germany concerning a viatical investment.

ll. Sometime after February, 1999, the exact date being unknown to the grand jury, GARY J. PIERCE and RAPHAEL LEVY conducted a meeting in Boca Raton, Palm Beach County, with a person known to the grand jury.

mm. Sometime after March, 1999, the exact date being unknown to the grand jury, GARY J. PIERCE met with an insurance agent known to the grand jury.

nn. On or about August 27, 1999, GARY J. PIERCE caused a letter to be sent to investors via the United States mails or interstate courier.

oo. On or about February 12, 1997, RAPHAEL R. LEVY met with investor Stanley Ellis and made numerous false representations to induce him to invest in a viaticated insurance policy purportedly issued by New York Life;

pp. On various dates between February, 1996, and continuing until at least March,1999, the exact dates being unknown to the grand jury RAPHAEL R. LEVY caused numerous ABS agents to make misrepresentations concerning the scope and purpose of a Fidelity Bond issued by Preferred National Insurance Company for the purpose of inducing persons to invest in viaticated insurance policies through ABS.

qq. On or about April 30, 1999, ALAN RICHARD LEWIS caused an international telefax communication to be sent from the offices of Financial Federated to a person known to the grand jury in Germany.

rr. On or about March 12, 1999, JEFFREY A. PAINE caused a letter to be sent to a person known to the grand jury in which PAINE represented that investors desiring to receive their guaranteed 15% rate of return would be paid back with new investors' monies that normally would be utilized to purchase additional policies.

ss. On or about November, 1996, RAPHAEL R. LEVY provided to an investor known to the grand jury a copy of what LEVY purported to be a viaticated insurance policy with Farmer's New World underlying that particular investor's viatical investment.

In violation of Title 18, United States Code, Sections 1341, and 1343; all in violation of Title 18, United States Code, Section 371.

COUNTS 2 THROUGH 14

USE OF THE MAILS

29. The allegations of paragraphs one through twenty-eight are realleged and incorporated herein by reference.

30. On or about the dates enumerated as to each count, at Palm Beach and Broward Counties, in the Southern District of Florida, and for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by false and fraudulent pretenses, representations and promises, the defendants enumerated as to each count did knowingly cause to be delivered by the United States Postal Service, or by private or commercial interstate carrier according to the direction thereon, mail matter, as more particularly described below:

COUNT	DATE	DEFENDANT	DESCRIPTION OF MAILING
2	February 27, 1997	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES, INC.	Federal Express shipment from Federated Title & Trust, Lauderhill, FL to Stanley Ellis, Palm Beach Gardens, FL
3	May 7, 1997	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES	Federal Express shipment to Caroline S. Mills, Lantana, FL

4	October 23, 1997	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES	Federal Express shipment from Federated Title & Trust, Lauderhill, FL to Stanley Ellis, Palm Beach Gardens, FL
5	April 23, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES, GARLAND HOGAN JEFFREY A. PAINE	Federal Express shipment from Federated Title & Trust, Lauderhill, FL through the escrow agent in West Palm Beach, FL to Edward Kligfeld, Lauderhill, FL
6	May 4, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES, GARLAND HOGAN JEFFREY A. PAINE	Federal Express shipment from Federated Title & Trust, Lauderhill, FL through the escrow agent in West Palm Beach, FL to Robert May, Lake Worth, FL

7	May 4, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES, GARLAND HOGAN JEFFREY A. PAINE	Federal Express shipment from Federated Title & Trust, Lauderhill, FL through the escrow agent in West Palm Beach, FL to Scott May, West Palm Beach, FL
8	May 20, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES, GARLAND HOGAN JEFFREY A. PAINE	Priority U.S. Mail package Express shipment from Federated Title & Trust, Lauderhill, FL through the escrow agent in West Palm Beach, FL to William H Warren, PO Box 10703, Naples, FL
9	June 2, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES, GARLAND HOGAN JEFFREY A. PAINE	Federal Express shipment from Federated Title & Trust, Lauderhill, FL through the escrow agent in West Palm Beach, FL to Lawrence and Joan Davidson, Boynton Beach, FL

10	July 29, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES, GARLAND HOGAN JEFFREY A. PAINE	Federal Express shipment from Federated Title & Trust, Lauderhill, FL through the escrow agent in West Palm Beach, FL to Irving and Eva Bennett, Boca Raton, FL
11	August 20, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES, GARLAND HOGAN JEFFREY A. PAINE	Federal Express shipment from Federated Title & Trust, Lauderhill, FL through the escrow agent in West Palm Beach, FL to Theodore Pace, Weston, FL
12	December 28, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES, GARLAND HOGAN JEFFREY A. PAINE	Federal Express shipment from Federated Title & Trust, Lauderhill, FL to Stanley Ellis, Palm Beach Gardens, FL

13	December 18, 1996	ALAN R. LEWIS RAPHAEL R. LEVY	Federal Express shipment from Federated Title & Trust, Lauderhill, FL to Dr. Harald Roelle, Bucholz, Germany
14	October 23, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES, INC. GARLAND HOGAN JEFFREY A. PAINE	Federal Express shipment from Federated Title & Trust, Lauderhill, FL to Wayne T. Holsinger, Tempe, AZ

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 15

CONSPIRACY TO LAUNDER PROCEEDS OF ILLEGAL ACTIVITY

31. The allegations of paragraphs one through twenty-six, twenty-eight, and thirty are realleged and incorporated herein by reference.

32. From at least as early as, February, 1996, and continuing through approximately September, 1999, the exact dates being unknown to the grand jury, at Palm Beach and Broward Counties, in the Southern District of Florida, and elsewhere, the defendants,

GARLAND HOGAN,
GARY J. PIERCE,
CSI Ag Ltd.,
RAPHAEL R. LEVY,
AMERICAN BENEFITS SERVICES, INC.,
WANDA TIRADO,
ALAN RICHARD LEWIS,
IVAN BURGOS,
ZANE BALSAM,
JUAN ARROYO,
HARVEY BRANDAU, and
CHERYL POINDEXTER,

did knowingly combine, conspire, confederate and agree with each other and with others known and unknown to the Grand Jury to commit offenses against the United States, that is, to conduct and attempt to conduct financial transactions affecting interstate and foreign commerce, which involved the proceeds of a specified unlawful activity, that is, mail fraud and wire fraud, in violation of Title 18, United States Code, Sections 1341 and 1343, knowing the property involved represented the proceeds of some form of unlawful activity, with the intent to promote the carrying on of said unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i), to conceal or disguise the nature, source or ownership of such proceeds, in violation of Title 18, United States Code, Section 1956(a)(1)(B); and to engage in monetary transactions in criminally derived property of a value greater than $10,000, which property was derived from wire fraud, in violation of Title 18, United States Code, Section 1957; all in violation of Title 18. United States Code. Section 1956(h).

OBJECT OF THE MONEY LAUNDERING SCHEME

33. It was the object of the money laundering conspiracy that defendants GARLAND HOGAN, GARY J. PIERCE, CSI Ag, RAPHAEL R. LEVY, AMERICAN BENEFITS SERVICES, WANDA TIRADO, JUAN ARROYO, ALAN RICHARD LEWIS, IVAN BURGOS, ZANE BALSAM, HARVEY BRANDAU and CHERYL POINDEXTER, together with themselves and with other persons known and unknown to the grand jury attempted to conceal or disguise the nature, source or ownership of monies deposited into the checking accounts of Financial Federated. These monies were thereafter expended directly out of the Financial Federated checking account, or caused to be transferred to one or more checking accounts in the name of Asset Security, an entity owned or controlled by FREDERIC BRANDAU. After funds were transferred to Asset Security from FEDERATED FINANCIAL the defendants thereafter sought to disguise the original source of these funds when the monies were used to purchase assets consisting of both real and personal property. Nearly all of the assets of Asset Security including monies deposited into its checking accounts, derived from investor monies deposited with Financial Federated and which were the proceeds of a mail and or wire fraud. It was further an object of the money laundering conspiracy that the defendants would cause the proceeds of mail and wire fraud activity to be used to purchase assets for their own benefit and for the benefit of numerous straw and nominee owners in a manner that would disguise that the monies used to purchase the assets had originated from the mail and wire fraud proceeds received by Financial Federated.

34. It was also an object of the money laundering conspiracy that the defendants: (a) conducted financial transactions with the proceeds of mail and wire fraud in order to promote the on-going fraud, that is, by paying trade creditors and making Ponzi-type payments to lull investors; and (b) engaged in monetary transactions in criminally derived property valued over $10,000, which property was derived from mail and wire fraud.

MANNER & MEANS OF LAUNDERING THE PROCEEDS OF ILLEGAL WIRE FRAUD ACTIVITY

It was part of the money laundering conspiracy that:

35. One or more of the defendants caused Financial Federated deposits exceeding $29,000,000 to be transferred and deposited into the checking accounts of Asset Security CORPORATION, a company beneficially owned by Frederick C. Brandau. These deposits into the Asset Security checking account represented the proceeds of a specified unlawful activity, namely mail fraud and wire fraud in violation of Title 18, United States Code, Sections 1341 and 1343.

36. The defendants would and did cause checks to be issued from the Financial Federated and the Asset Security CORPORATION checking accounts in payment of assets, both real and personal property, in which title was taken in the names of straw and nominee owners to disguise that the assets had been purchased with monies originally derived from the mail and wire fraud perpetrated by Financial Federated and defendants Frederick C. Brandau and GARLAND HOGAN, and other persons known and unknown to the grand jury.

37. Defendant WANDA TIRADO and others known to the grand jury would and did cause checks issued from the Financial Federated and Asset Security checking accounts to be used to pay the on-going trade creditors of AMERICAN BENEFITS SERVICES and its predecessor companies in an effort to promote the mail and wire fraud.

38. In order to promote the on-going scheme to defraud. Frederick C. Brandau and defendant RAPHAEL R. LEVY caused mail and wire fraud proceeds to be beneficially received by LEVY from Financial Federated funds, in at least the following amounts in connection with the following entities controlled by him: (a) AMERICAN BENEFITS SERVICES, at least $14,000,000; (b) Levy Insurance Agency, at least $3,000,000; (c) U.S. Benefits Services, at least $3,000,000; and (d) First R and R Trust, at least $1,500,000.

39. Frederick C. Brandau caused an international wire transfer to be made from the Bahamas with the proceeds of mail and wire fraud to account 3290204697 at CITIBANK, at Fort Lauderdale, Florida.

40. In order to conceal or disguise the nature, source or ownership of mail fraud proceeds, Frederick C. Brandau and defendant ZANE BALSAM caused mail and wire fraud proceeds to be issued to one or more companies owned or controlled by ZANE BALSAM in at least the following amounts: (a) $7,000,000 to ELS Group, Inc.; (b) $3,000,000 to Real Time Encryption, Inc.; (c) $300,000 to Virtual Motion Entertainment Group, Inc.

41. In order to conceal or disguise the nature, source or ownership of mail fraud proceeds, Frederick C. Brandau and defendant ZANE BALSAM caused at least $1,899,000 in mail and wire fraud proceeds to be issued to a Canadian

entity known as Robbins, Appleby & Taub in connection with the purchase of an office building in Toronto, Canada.

42. Frederick C. Brandau and defendant GARY J. PIERCE attempted to hide and conceal large sums of investor monies received by Financial Federated by causing wire transfers from bank accounts controlled by Frederick C. Brandau in the United States to one or more accounts controlled by GARY J. PIERCE and CHERYL POINDEXTER in the Bahamas. GARY J. PIERCE and CHERYL POINDEXTER thereafter acted in concert to transfer the funds from the Bahamas to one or more bank accounts in California under their control in a manner designed to conceal or disguise the true nature, source, location or origin of the funds.

43. Beginning as early as March 27, 1999, the exact date being unknown to the grand jury Frederick C. Brandau and defendant GARY J. PIERCE caused the transfer of numerous parcels of real property originally purchased with monies of Financial Federated and Asset Security. The deeds to these parcels of real property had been listed in the names of Asset Security, straw owners, relatives of Frederick C. Brandau, and employees of Frederick C. Brandau. The transfer of these properties to CSI Ag Ltd. was accomplished after Frederick C. Brandau and defendant GARY J. PIERCE had actual knowledge of the grand jury investigation through the use of forged and fraudulent deeds.

44. Defendant Gary J. Pierce caused international wire transfers to be made from the Bahamas with the proceeds of mail and wire fraud to pay friends, associates, and family members in California, Indiana, and other locations.

45. Defendant RAPHAEL R. LEVY attempted to conceal or disguise his receipt of mail and wire fraud proceeds from Financial Federated by forming and causing to be formed separate trusts known as First R & R Trust, and M & M Associates Trust and hiring a third party known to the grand jury to control financial accounts opened in the names of First R & R Trust, and M & M Associates Trust.

46. RAPHAEL R. LEVY promoted the mail fraud scheme by causing sales commisssions to be paid to the following sales agents, among others: Borg Intergroup Ltd., David Kligfeld, Innovative Business Concepts, and U.S. Golden Eagle Trust.

47. Frederick C. Brandau, and defendants RAPHAEL R. LEVY, WANDA TIRADO, and IVAN BURGOS, caused at least $535,000 in mail and wire fraud proceeds to be transferred by wire from banks in the Southern District of Florida for the purpose of developing real property in Mexico.

48. Defendant WANDA TIRADO caused checks and wire transfers consisting of mail and wire fraud proceeds in an amount exceeding $500,000 to be issued to the order of relatives in order to conceal or disguise the nature, source or ownership of such proceeds.

49. In order to conceal or disguise the nature, source or ownership of mail fraud proceeds, RAPHAEL R. LEVY caused AMERICAN BENEFITS SERVICES to issue checks to M & M Associates Trust totaling at least $750,000.

50. ALAN RICHARD LEWIS caused Financial Federated and Asset Security to issue at least $335,000 in

checks for his benefit to the order of Asset Based Services, Ltd., a Turks & Caicos company, and caused such funds to be sent outside of the United States.

51. ALAN RICHARD LEWIS caused real property in Palm Beach County and Monroe County to be purchased with funds derived from Financial Federated and title to be placed in the names of his wife, Karin Lewis, and Lewis Limited Partnership, respectively.

52. IVAN BURGOS caused more than $250,000 in Financial Federated checks for his benefit to be issued to the order of family members.

53. IVAN BURGOS and Frederick C. Brandau purchased more than $750,000 in jewelry with funds provided by Financial Federated, and caused the purchases to be made in the name of Waterbed Odyssey, a defunct Florida corporation.

54. IVAN BURGOS caused or participated in the purchase of one or more parcels of real property with mail and wire fraud funds provided by Financial Federated and caused title to be taken in the names of himself and members of his family.

55. IVAN BURGOS participated in executing numerous forged deeds by which title to real property was purportedly transferred from various owners to C.S.I. Ag, Ltd.

56. CHERYL POINDEXTER participated in receiving at least $190,000 in international wire transfers from Suisse Security Bank & Trust to her accounts in California.

57. CHERYL POINDEXTER participated in disguising the ownership and control of mail and wire fraud proceeds by recruiting a person known to the grand jury to receive an international wire transfer to be made from Suisse Security Bank & Trust in the Bahamas to a Bank of America account in California, and thereafter back to a bank account in Miami, Florida.

OVERT ACTS

58. In furtherance of the conspiracy and to effect its aims and objects, there was committed, by one or more of the co-conspirators, at Palm Beach and Broward Counties, in the Southern District of Florida and elsewhere, at least one of the following overt acts:

a. The financial transactions representing the proceeds of mail and wire fraud, which transactions were designed to conceal or disguise the nature, source or ownership of the proceeds, and which are set forth in Counts 16 through 50 are incorporated herein and realleged as though restated herein as individual overt acts done in furtherance of the conspiracy.

b. Frederick C. Brandau caused a facsimile signature of John J. Rassulo to be added to the name of authorized signators on a FEDERATED FINANCIAL checking account at Union Bank at some time after February 2, 1996, the exact date being unknown to the grand jury.

c. On or about March 5, 1999, Frederick C. Brandau caused an amended signature card to be filed with Union Bank adding his name as an authorized signator on a Financial Federated checking account.

d. Between September 22, 1997, and March 23, 1999, the exact dates being unknown to the grand jury, Frederick C. Brandau caused approximately $29,000,000 in Financial Federated funds derived from investors to be deposited into the First Union Bank checking accounts of Asset Security.

e. On or about January 15, 1998, Frederick C. Brandau caused Asset Security check 1062 in the amount of $159,945.55 to be issued to the order of Dominion Title in connection with the purchase of real property located at 3301 SW 117th Avenue, Davie, Florida and titled in the name of Asset Security.

f. On or about January 21, 1998, a person known to the grand jury executed a $450,000 mortgage to Quad-B-Ltd. in connection with the purchase of real property located at 218 Dexter Court, Tavernier, Monroe County, Florida with funds derived from a mail fraud.

g. On or about May 21, 1998, Frederick C. Brandau caused Asset Security check 1129 in the amount of $290,000 to be issued to the order of Pall Spera Company in connection with the purchase of real property located at 3419 Weeks Hill Road, Stowe, Vermont, and titled in the name of Asset Security.

h. On or about June 22, 1998, Frederick C. Brandau caused Asset Security check 1143 in the amount of $250,000 to be issued to the order of Citizens Title in connection with the purchase of real property located at 11500 SW 37 Ct., Davie, Florida.

i. On or about August 21, 1998, Frederick C. Brandau caused a $600,000 mortgage in the name of

Quad-B-Ltd. on real property located at 3301 SW 117th Avenue, Davie, Florida.

j. On or about October 8, 1998, Frederick C. Brandau caused Asset Security to wire transfer the sum of $1,875,000 from its checking account to Stackpole and French in connection with the purchase of real property located 506 North Hill Road, Stowe, Vermont.

k. On or about October 23, 1998, Frederick C. Brandau caused Asset Security check 1243 in the amount of $345,000 to be issued to the order of Citizens Title in connection with the purchase of real property located at 2260 Lazy Lane, Ft. Lauderdale, FL, (also known as Lazy Lake, FL), and titled in the name of Asset Security Corporation.

l. On or about October 27 1998, Frederick C. Brandau caused a $385,000 mortgage in the name of Quad-B-Ltd to be executed on real property located at 2260 Lazy Lane, Ft. Lauderdale, FL, (also known as Lazy Lake, FL).

m. On or about November 2, 1998, Frederick C. Brandau caused Asset Security check 1037 at Chittendon Bank, Vermont, to be issued to Stackpole & French Trust Account in partial payment of a $330,000 purchase price for real property located at 231 Weeks Hill Meadow, Stowe, Vermont.

n. On or about November 13, 1998, Frederick C. Brandau caused Asset Security to wire transfer the sum of $770,000 from its checking account to Frank Sutton Escrow in connection with the purchase of real property commonly known as Lots 52 and 53, Fairway Estates, Sky Valley, GA, and titled in the name of Asset Security.

o. On or about November 13, 1998, Frederick C. Brandau caused a $770,000 mortgage in the name of Quad-B-Ltd to be executed on real property commonly known as Lots 52 and 53, Fairway Estates, Sky Valley, GA.

p. On or about December 21, 1998, Frederick C. Brandau caused Asset Security check 1297 in the amount of $1,735,400 to be issued to the order of Robbins Appleby & Taub in connection with the purchase of real property, that is, two buildings located at 30 and 30 A Hazelton Avenue, Toronto, Canada.

q. On or about February 26, 1999, Frederick C. Brandau caused $165,537.08 to be wire transferred from Asset Security in Ft. Lauderdale to Anton W. Sterba in Summerville, South Carolina in connection with the purchase of real property located at 105 Lakeview Drive, Summerville, South Carolina for $215,000, and occupied by Frederick C. Brandau's father-in-law, John J. Rassulo.

r. On or about March 30, 1999, Frederick C. Brandau caused $400,000 to be wire transfered [sic] in separate increments of $200,000 each from Asset Security in Ft. Lauderdale, Florida to Richard Scimone, Cambridge, Massachusetts, in connection with the purchase of real property located at 40 Greybirch Park, Belmont, Massachusets [sic] for $630,000, which property was titled in the name of Frederick C. Brandau's brother-in-law, John A. Rassulo, and Rassulo's wife.

s. On or about April 29, 1999, the exact date being unknown, GARY J. PIERCE caused a limited power of attorney to be executed and forwarded to a person known to the grand jury for the purpose of transferring title to CSI Ag Ltd. on multiple parcels of real property purchased

with investor funds derived from the mail fraud scheme described earlier in this indictment.

t. On or about April 30, 1999, Frederick C. Brandau caused the wire transfer of $5,000,000 in funds from Financial Federated in Ft. Lauderdale to a bank account in the Bahamas for the benefit of CSI Ag Ltd. which was controlled by GARY J. PIERCE.

u. On or about March 9, 1998, IVAN BURGOS caused the purchase of a Union Bank cashier's check in the amount of $48,000 with mail and wire fraud funds for the purpose of buying real property located at 1855 Winding Oaks Way, Naples. Florida, and titled in the name of Debi J. Molina.

v. On or about April 16, 1998, IVAN BURGOS caused the purchase of a Union Bank cashier's check in the amount of $100,000 with mail and wire fraud funds for the purpose of buying real property located at 2325 Carrington Court, Unit 202, Naples, Florida, and titled in the name of Debi J. Molina.

w. On or about October 14, 1998, IVAN BURGOS caused the purchase of a Union Bank cashier's check in the amount of $79,500 with mail and wire fraud funds for the purpose of buying real property located at 1600 Misty Pines Circle, P-301, Naples, Florida, and titled in the name of Debi J. Molina.

x. On or about October 28, 1998, IVAN BURGOS caused the purchase of a Union Bank cashier's check in the amount of $150,000 with mail and wire fraud funds for the purpose of buying real property located at 1771 Kitcheners Court, Stonebridge Unit 4, Naples, Florida, and titled in the name of Debi J. Molina.

y. On or about June 10, 1998, ALAN RICHARD LEWIS caused the purchase of a Union Bank cashier's check with mail and wire fraud proceeds in the amount of $200,112.02 for the purpose of buying real property located at 917 Emerald Row, Gulfstream, Palm Beach County, Florida and titled in the name of Karin Lewis, as Trustee of the Karin Lewis Living Trust.

z. On or about February 13, 1999, ZANE BALSAM executed a vehicle transfer form with Symbolic Motors in California to take possession of a 1997 Mercedes S600 paid for with Financial Federated mail and wire fraud proceeds.

aa. On or about September 10, 1998. ALAN RICHARD LEWIS caused Financial Federated to issue check number 3026 to Autohaus in the amount of $46,356.98 in payment of a 1999 Mercedes Benz E320W titled in the name of his wife.

bb. Between on or about June, 1997 and March, 1999, ALAN RICHARD LEWIS caused to be deposited into one or more bank accounts under his control at least $1.8 million in checks issued by Financial Federated and Asset Security, payable to the order of K.A.L. USA, Inc.

cc. Between on or about November, 1998 and January, 1999, ALAN RICHARD LEWIS caused to be deposited in Swiss American National Bank of Antigua, St. John's Antigua, at least $335,000 in Financial Federated checks issued to Asset Based Services, Ltd.

dd. On or about January 23, 1999, WANDA TIRADO issued Asset Security check 5413 to her sister, Sandra Arroyo, in the amount of $11,000 purportedly in payment of "security services" provided by Sandra Arroyo.

ee. On or about January 25, 1999, RAPHAEL R. LEVY caused the transfer of $240,000 in fraud proceeds by international wire from account of First R & R Trust at Republic Security Bank, Lake Worth, Florida, to an account in Mexico.

ff. On or about February 23, 1999, WANDA TIRADO caused Financial Federated check 7669 for $256,546.78 to he issued to Juan Arroyo as a "loan."

gg. On or about March 12, 1999, RAPHAEL R. LEVY caused ABS to issue check number 2135 to First R & R Trust in the amount of $165,000.

hh. On or about March 26, 1999, ALAN LEWIS caused the purchase of a cashier's check in the amount of $366,125 with mail and wire fraud funds for the purpose of purchasing real property located at 75 West Plaza del Sol, Islamorada, Monroe County, Florida, in the name of Lewis Limited Partnership.

ii. On or about March 27, 1999, IVAN BURGOS executed numerous forged warranty deeds that purported to transfer interests in real property to C.S.I., Ag., Ltd.

jj. Between on or about March 25, 1999, and August 5, 1999, GARY J. PIERCE caused six separate transfers totalling $145,000 in mail fraud funds to be wired from the Bahamas to a person known to the grand jury who resided in California.

kk. Between May 16, 1999, and approximately July 6, 1999, GARY J. PIERCE caused at least three separate transfers totalling $120,000 in mail fraud funds to be wired from the Bahamas to a relative of his known to the grand jury.

ll. On or about April 27, 1999, WANDA TIRADO caused $35,000 in mail and wire fraud proceeds to be loaned to a person known to the grand jury, and attempted to conceal the source of the loan.

mm. On or about May 13, 1999, RAPHAEL R. LEVY caused ABS to issue check number 2372 to First R & R Trust in the amount of $252,415.16.

nn. Between on or about April 17, 1992, and June 16, 1999, Frederick C. Brandau and IVAN BURGOS caused more than $750,000 in jewelry purchases to be made in the name of Waterbed Odyssey, a defunct Florida corporation, from a jeweler known to the grand jury, and caused the payments to be made with Financial Federated checks or with an American Express card issued under the name of John Rassulo.

oo. On or about June, 1999, ZANE BALSAM caused a power of attorney form containing a forged notary signature to be submitted in connection with acquiring real property in Florida, under the name of a foreign corporation.

pp. Between on or about June 18, 1998 and September 17, 1998, ZANE BALSAM caused at least six separate international wire transfers with mail and wire fraud funds to be made from a bank account in the name of ELS Group, Inc. at Washington Mutual Bank, to Canadian Imperial Bank of Commerce, ("CIBC") for the benefit of RY LOR Technologies.

qq. On or about July 13, 1998, ZANE BALSAM caused RY LOR Technologies to wire transfer approximately $1,250,661.30 in mail and wire fraud proceeds from CIBC in Canada to the escrow account English,

McCaughan & O'Bryan at Sun Bank to fund the purchase of real property located at 2935 Spanish River Road, Boca Raton, Florida, and which real property was titled in the name of Tidal Wave Associates Ltd.

rr. On or about March 9, 1999, HARVEY BRANDAU caused the wire transfer of approximately $247,000 in Financial Federated mail and wire fraud proceeds from a bank account at Union Bank, Morrisville, Vermont, to Barclay's Bank in the Bahamas.

ss. On or about March 9, 1999, HARVEY BRANDAU caused the wire transfer of approximately $250,000 in Financial Federated mail and wire fraud proceeds from a bank account at Colonial Bank, Atlanta, Georgia, to Barclay's Bank in the Bahamas.

tt. On or about July 9, 1999, GARY J. PIERCE caused $180,000 in mail and wire fraud funds to be wire transferred from Suisse Security Bank & Trust in the Bahamas to Bank Atlantic, account of First American Title Insurance in Florida, for the benefit of Juan Arroyo for the purpose of buying real property located at 1711 SW 1st Avenue, Pompano Beach, FL 33060.

uu. On various dates between March 25, 1999 and August 5, 1999, GARY J. PIERCE caused at least $145,000 in mail and wire fraud proceeds to be wire transferred from a Suisse Security Bank & Trust account in the Bahamas to a person known to the grand jury in California.

vv. On various dates between May 11, 1999 and August 5, 1999, GARY J. PIERCE caused at least $190,000 in mail and wire fraud proceeds to be wire

transferred from a Suisse Security Bank & Trust account in the Bahamas to Awe Productions, Inc. doing business as Poindexter Designs, in California.

ww. On various dates between May 16, 1999 and July 6, 1999, GARY J. PIERCE caused at least $120,000 in mail and wire fraud proceeds to be wire transferred from a Suisse Security Bank & Trust account in the Bahamas to a Wells Fargo Bank account in Indiana for the benefit of a relative known to the grand jury.

xx. On or about July 29, 1999, Frederick C. Brandau caused approximately $1,000,000 in mail and wire fraud proceeds to be wire transferred from a Canadian Imperial Bank of Commerce account in Nassua, Bahamas to account 3290204697 at CITIBANK, at Fort Lauderdale, Florida.

yy. On or about July 21, 1999, in Palm Beach County, Florida, HARVEY BRANDAU attempted to sell and convey title to a Lotus luxury automobile that had been purchased with mail and wire fraud funds provided by Financial Federated.

zz. On or about September 17, 1999, GARY PIERCE and CHERYL POINDEXTER caused $147,727.19 in mail and wire fraud proceeds to be wire transferred from Suisse Security Bank & Trust in the Bahamas to Bank of America, supposedly for the benefit of Cold Stone Creamery in California.

aaa. On or about September 20, 1999, GARY J. PIERCE and CHERYL POINDEXTER caused approximately $50,000 in mail and wire fraud proceeds to be wire transferred from a Bank of America bank account to a bank account in Miami, Florida.

bbb. On or about March 26, 1998, RAPHAEL R. LEVY and AMERICAN BENEFITS SERVICES caused check 2847 in the amount of $4,459.10 to be issued to Banyan Printing.

All in violation of Title 18, United States Code, Section 1956(h).

COUNTS 16 THROUGH 45

FINANCIAL TRANSACTIONS WITH MAIL & WIRE FRAUD PROCEEDS & WITH THE INTENT TO CONCEAL OR DISGUISE THE NATURE, SOURCE OR OWNERSHIP OF THE PROCEEDS

18 U.S.C. § 1956(a)(1)(B)

59. The allegations set forth in paragraphs one through twenty-eight, thirty, and thirty-two through fifty-seven of this Indictment are incorporated by reference.

60. On such dates and in the amounts set forth below, at Palm Beach, Broward, and Dade Counties, in the Southern District of Florida, the defendant named therein did knowingly conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, which involved the proceeds of a specified unlawful activity, that is, mail and wire fraud, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of said specified unlawful activity and while conducting and attempting to conduct such financial transaction did know that the property involved in the financial transaction, that is, funds in the amounts set forth below, represented the proceeds of unlawful activity:

COUNT	DATE	DEFENDANT	TRANSACTION
16	September 30, 1998	GARLAND HOGAN	$239,230.62 mortgage executed in favor of Quad-B-Ltd., Inc. on real property located at 220 Lazy Lane, Lazy Lake, FL
17	January 23, 1999	WANDA TIRADO	Asset Security check 5413 for $11,000 issued to Sandra Arroyo for "Security Services"
18	January 25, 1999	RAPHAEL R. LEVY	Wire transfer of $240,000 from First R & R account at Republic Security Bank, Lake Worth, FL to Mexico
19	November 19, 1998	RAPHAEL R. LEVY	ABS check 3834 issued to M & M Associates for $33,213.98
20	February 23, 1999	WANDA TIRADO JUAN ARROYO	Financial Federated check 7669 for $256,546.78 issued to Juan Arroyo as a "loan"

21	March 12, 1999	RAPHAEL R. LEVY	American Benefits Services check 2135 in the amount of $165,000 issued to First R & R Trust
22	September 10, 1998	ALAN RICHARD LEWIS	Financial Federated check 3026 in the amount of $46,356.98 issued to the Autohaus for payment of a 1999 Mercedes E320W titled in the name of Karin Lewis
23	June 10, 1998	ALAN RICHARD LEWIS	Union Bank cashier's check in the amount of $200,112.02 issued to Devitt, Thistle, Devitt, PA Trust Account
24	April 16, 1998	IVAN BURGOS	Union Bank cashier's check in the amount of $100,000 issued in connection with purchase of 2325 Carrington Court, Unit 202, Naples, Florida and titled in name of Debi J. Molina

25	December 7, 1998	ALAN RICHARD LEWIS	Financial Federated check 5256 in the amount of $100,000 issued to the order of Asset Based Services, Ltd.
26	March 3, 1999	IVAN BURGOS	Mortgage executed in favor of CSI, Ag., Ltd. in the amount of $113,000
27	October 6, 1998	IVAN BURGOS	Financial Federated check 5031 in the amount of $14,000 issued to Carlos Burgos
28	October 28, 1998	IVAN BURGOS	Union Bank cashier's check in the amount of $150,000 issued in connection with purchase of 1771 Kitcheners Court, Naples, Florida and titled in name of Debi J. Molina
29	March 26, 1999	ALAN RICHARD LEWIS	Union Bank cashier's check in the amount of $366,125.65 issued to the order of Robert Feldman Trust Account

30	April 29, 1999	IVAN BURGOS	Financial Federated check 5628 issued to Robert Buchwald in the amount of $273,456.75 for purchase of loose diamonds
31	May 13, 1999	RAPHAEL R. LEVY	ABS check number 2372 in the amount of $252,415.16 issued to First R & R Trust
32	February 12, 1999	ZANE BALSAM	Union Bank cashier's check in the amount of $198,729 issued to Symbolic in payment of a 1997 Mercedes Benz S600
33	April 12, 1999	ZANE BALSAM	Asset Security escrow account check 1361 in the amount of $1,500,000 re: Minute Communications
34	June 18, 1998	ZANE BALSAM	Wire transfer for $450,000 from ELS Group to RY LOR TECH in Canada

35	June 26, 1998	ZANE BALSAM	Wire transfer for $450,000 from ELS Group to RY LOR TECH in Canada
36	July 7, 1998	ZANE BALSAM	Wire transfer for $500,000 from ELS Group to RY LOR TECH in Canada
37	April 12, 1999	ZANE BALSAM	Vehicle transfer form executed by person known to the grand jury concerning 1999 Bentley purchased from Symbolic Motors
38	February 3, 1999	ZANE BALSAM	Financial Federated check 5404 in the amount of $88,500 issued to Palm Beach Motor Cars in payment of a 1999 Lotus automobile
39	February 3, 1999	ZANE BALSAM	Execution of documents involving transfer of title to a 1999 Lotus automobile

40	February 12, 1999	ZANE BALSAM	Financial Federated check 5435 in the amount of $198,729 issued to Union Bank to pay for a 1997 Mercedes S600 automobile
41	July 9, 1999	GARY J. PIERCE JUAN ARROYO WANDA TIRADO	International wire transfer in the amount of $180,000 from Suisse Security Bank & Trust in the Bahamas to Bank Atlantic for the credit of First American Title Insurance, Coral Springs, Florida
42	July 16, 1999	JUAN ARROYO	Procuring false HUD-1 statement in connection with purchase of real property located at 1711 SW 1st Avenue, Pompano Beach, FL 33060
43	April 27, 1999	WANDA TIRADO	$35,000 check issued from Juan Arroyo checking account at Union Bank

44	July 21, 1999	HARVEY BRANDAU	Attempted to sell and transfer title to a Lotus automobile at Palm Beach Motorcars
45	September 20, 1999	GARY J. PIERCE CHERYL POINDEXTER	$50,000 wire transfer from Bank of America, Thousand Oaks, CA to a bank account located in Miami, Florida

All in violation of Titlel8, United States Code, Sections 1956(a)(1)(B)(i) and 2.

COUNTS 46 THROUGH 50

FINANCIAL TRANSACTIONS WITH PROCEEDS FROM AND TO PROMOTE THE ARTIFICE AND SCHEME TO DEFRAUD

18 U.S.C. § 1956(a)(1)(A)(i)

61. The allegations set forth in paragraphs one through twenty-eight, thirty, thirty-two through fifty-eight and sixty of this Indictment are incorporated by reference.

62. On or about the dates enumerated as to each count, in Palm Beach and Broward Counties, in the Southern District of Florida and elsewhere the defendant, as identified below, did knowingly conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, which involved the proceeds of a specified unlawful activity, that is, mail and wire fraud, in violation of Title 18, United States Code, Sections 1341, 1343, with the intent to promote the carrying on of the

specified unlawful activity and while conducting and attempting to conduct such financial transaction knew the property involved in the financial transaction, that is, monetary instruments in the approximate amounts set forth below, represented the proceeds of unlawful activity:

Count	Date	Defendant	Transaction and Amount
46	October 9, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES	ABS check 3686 issued to Borg Intergroup Ltd. in the amount of $22,276
47	April 23, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES	ABS check 2959 issued to David Kligfeld in the amount of $7,875
48	March 20, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES	ABS check 2819 issued to Innovative Business Concepts in the amount of $24,682
49	September 18, 1998	RAPHAEL R. LEVY AMERICAN BENEFITS SERVICES	ABS check 3591 issued to U.S. Golden Eagle Trust in the amount of $44,376

All in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i) and 2.

COUNTS 50 THROUGH 51

Financial Transactions with Criminally Derived Property

18 U.S.C. § 1957

63. The allegations set forth in paragraphs one through twenty-eight, thirty, thirty-two through fifty-eight, sixty and sixty-two of this Indictment are incorporated by reference.

64. On the various dates set forth below the named defendant in Palm Beach or Broward County, in the Southern District of Florida, did knowingly engage and attempt to engage in a monetary transaction affecting interstate and foreign commerce, in criminally derived property of a value greater than $10,000, such monetary proceeds having been derived from a specified unlawful activity, that is, mail and wire fraud:

Count	Date	Defendant	Transaction
50	December 4, 1998	GARLAND HOGAN	Financial Federated check 5258 in the amount of $116,513.95 issued to GARLAND HOGAN
51	February 28, 1999	ZANE BALSAM	Financial Federated check 5463 for $200,000 issued to Performance Marine, a boat business

All in violation of Title 18, United States Code, Sections 1957 and 2.

COUNT 52

CRIMINAL FORFEITURE

65. As a result of the foregoing offenses described in Counts 15 through 51, the defendants, GARLAND HOGAN, GARY J. PIERCE, CSI Ag LTD., RAPHAEL R. LEVY, AMERICAN BENEFITS SERVICES INCORPORATED, WANDA TIRADO, ALAN RICHARD LEWIS, IVAN BURGOS, ZANE BALSAM, JUAN ARROYO, HARVEY BRANDAU, and CHERYL POINDEXTER shall forfeit to the United States all property, real and personal, invoked in the aforestated offenses and all property traceable to such property, including, but not limited to, the following:

A. $117,000,000 in United States currency and all interest and proceeds traceable thereto, in that such sum in aggregate is property which was involved in the aforestated offenses or is traceable to such property.

B. Financial Instruments as follows:

1. 300,000 shares of stock in "Secure Transactions International Corp.", account number 16, in the name of Asset Security Corporation.

2. All United States (US) Currency in account number 47697 in the name of Financial Federated Title and Trust Inc., at Union Bank.

3. All US Currency in account number 51003546 in the name of Financial Federated Title and Trust Inc., at Union Bank.

4. All US Currency in account number 2090001846860 in the name of Asset Security Corporation at First Union National Bank.

5. All US Currency in account number 2090001846857 in the name of Asset Security Corporation at First Union National Bank.

6. All US Currency in account number 200002305730 in the name of Asset Security Corporation at First Union National Bank.

7. All US Currency in account number 2000002823128 in the name of Asset Security Corporation at First Union National Bank.

8. All US Currency in account number 2090001846239 in the name of Asset Security Corporation at First Union National Bank.

9. All US Currency in account number 2000002305727 in the name of Asset Security Corporation at First Union National Bank.

10. All US Currency in account number 2090002792748 in the name of Asset Security Corporation at First Union National Bank.

11. All US Currency in account number 2090002896453 in the name of Viatical Asset Recovery Corporation at First Union National Bank.

12. All US Currency in account number 8025604458 in the name of Financial Federated Title and Trust Inc., at Colonial Bank.

13. All US Currency in account number 274525452 in the name of Asset Security Corporation at Chittenden Bank.

14. All US Currency in account number 274526920 in the name of Asset Security Corporation at Chittenden Bank.

15. All US Currency in account number 274526939 in the name of Asset Security Corporation at Chittenden Bank.

16. All Currency in trust account number 441-391-0 at the Royal Bank of Canada, Main Branch, Bay Street, Nassau, Bahamas in the name of Anthony A. Thompson.

17. All Currency in account number 1593506 in the name of International Resources Securities LTD, at Barclays Bank PLC, Main Branch, Bay Street, Nassau, Bahamas.

18. All Currency in account number 1034-280 in the name of CSI AG, at Barclays Bank PLC, Main Branch, Bay Street, Nassau, Bahamas.

19. 100 shares of stock in Asset Equity located in Canada.

C. Real property together with all contents appurtenances and improvements thereto and thereon as follows:

1. A parcel of land located at 218 Dexter Ct. Tavernier, Florida.

2. A parcel of land located at 10150 W. Pamondeho Circle, Crystal River, Florida.

3. A parcel of land located in Citrus County, Florida, Section 21, Township 18 South, Range 17 East, Parcel #21-18S17E-12343.

4. A parcel of land located in Citrus County, Florida, Section 32, Township 17 South, Range 17 East, Parcel #32-17S17E-23000.

5. A parcel of land located at 1209 W. Ivan Boulevard, Hendry County, Florida.

6. A parcel of land located at 5241 N.E. 1st Avenue, Fort Lauderdale, Florida.

7. A parcel of land located at 8150 Brent St. #732, Port Richey, Florida.

8. A parcel of land located at 3301 SW 117th Avenue, Davie, Florida.

9. A parcel of land located at 2260 Lazy Lane, Fort Lauderdale, Florida.

10. A parcel of land located at 2200 Lazy Lane, Ft. Lauderdale, Florida.

11. A parcel of land located at 98 Marina Avenue, Key Largo, Florida.

12. A parcel of land located at 2745 Meadowood Drive, Fort Lauderdale (Weston), Florida.

13. A parcel of land located at 943 S.E. 10 Street, Pompano Beach, Florida.

14. A parcel of land located in Citrus County, Florida, and more particularly described as Lot 34, SPRING RUN, Parcel #05 18S 17E 11000 0340.

15. A parcel of land located in Citrus County, Florida, and more particularly described as Lot 33, SPRING RUN, Parcel #05 18S 17E 11000 0330.

16. A parcel of land located at Unit 505, Seven Lakes Condominium 20A, Lee County, Florida, Parcel #23-45-24-42-00000.5050.

17. A parcel of land located at 3419 Weeks Hill Road, Stowe, Vermont.

18. A parcel of land located at 506 North Hill Road, Stowe, Vermont, said lands and premises contain 57.62 acres, 14 acres shown as Lot 1, and 14 acres shown as Lot 2.

19. A parcel of land located at Lots 52 & 53, Fairway Estates, Sky Valley, Georgia.

20. A parcel of land located at 231 Weeks Hill Meadow, Stowe, Vermont.

21. A parcel of land located at 1100 NW 114 Avenue, Coral Springs, Florida.

22. A parcel of land located at 11500 SW 37 Court, Dade, Florida.

23. A parcel of land located at 2935 Spanish River Road, Boca Raton, Florida.

24. A parcel of land located at 40 Grey Birch Park, Belmont, Massachusetts.

25. A parcel of land located at 105 Lakeview Drive, Summerville, South Carolina.

26. A parcel of land located at 9720 N.W. 33rd Manor, Sunrise, Florida.

27. A parcel of land located at 925 Emerald Row, Gulfstream, Palm Beach County, Florida.

28. A parcel of land located at 75 West Plaza del Sol, Islamorada, Monroe County, Florida.

29. A parcel of land located at 1711 SW 1st Avenue, Pompano Beach, Broward County, Florida.

30. A parcel of land located at 1855 Winding Oaks Way, Naples, Collier County, Florida.

31. A parcel of land located at 2325 Carrington Court, Unit 4-202, Naples, Collier County, Florida.

32. A parcel of land located at 11600 Misty Pines Circle, P-301, Naples, Collier County, Florida.

33. A parcel of land located at 1771 Kitcheners Court, Naples, Collier County, Florida.

D. Other personal property as follows:

1. A 1989 Agusta helicopter, model A109A11, identification number N74TC.

2. A 1995 Bell Long Ranger IV helicopter, model 206L4, identification number 52115.

3. A 1937 Ford 3 window, vehicle identification number W308557.

4. A 1997 Chevrolet Corvette, 2 door, vehicle identification number 1G1YY22GXV5102930.

5. A 1997 Chevrolet Tahoe, 4 door, vehicle identification number 1GNEC13R7VJ370755.

6. A 1997 Chevrolet Corvette, 2 door, vehicle identification number 1G1YY22G2V5105179.

7. A 1997 Mercedes Benz S600, 2 door, vehicle identification number WDBGA76G4VA345489.

8. A 1997 Plymouth Prowler, 2 door, vehicle identification number 1P3EW65F2VV300945.

9. A 1997 Pontiac Firebird, 2 door, vehicle identification number 2G2FS22K0V2215645.

10. A 1997 Porsche Twin Turbo, 2 door, vehicle identification number WPOAC2994VS375216.

11. A 1998 Aston Martin, 2 door, vehicle identification number SCFAA4123WK202399.

12. A 1998 Aston Martin, 2 door, vehicle identification number SCFAA4128WK202527.

13. Cashiers check number 132404 in the amount of $90,000.00 and its proceeds which represent the proceeds from the sale of a 1998 Aston Martin, 2 door, vehicle identification number SCFAA4129 WK202519.

14. A 1998 Aston Martin, 2 door, vehicle identification number SCFAA4128WK202513.

15. A 1998 Chevrolet Corvette, 2 door, vehicle identification number 1G1YY32G7W5126318.

16. A 1998 Chevrolet Corvette, 2 door, vehicle identification number 1G1YY32GOW5106248.

17. A 1998 Dodge Viper, 2 door, vehicle identification number 1B3ER65EOWV401242.

18. A 1998 Lotus Espirit V8, 2 door, vehicle identification number SCCDC0826WHA15550.

19. A 1998 Lotus Espirit V8, 2 door, vehicle identification number SCCDC0821WHA15438.

20. A 1998 Lotus Espirit V8, 2 door, vehicle identification number SCCDC0821WHA15651.

21. A 1998 Toyota Sierra Van, vehicle identification number 4T3ZF13C3WU027196.

22. A 1999 BMW 328i, 4 door, vehicle identification number WBAAM5332XKG05387.

23. A 1999 Cadillac Escalade, 4 door, vehicle identification number 1GYEK13R1XR400598.

24. A 1999 Chevrolet Corvette, 2 door, vehicle identification number 1G1YY32G5X5121412.

25. A 1999 Chevrolet Tahoe, 4 door, vehicle identification number 1GNEK13R7XJ411486.

26. A 1999 Ford 4x4 Pickup, vehicle identification number 1FTNF21LXXEB97247.

27. 27A1999 Ford Expedition, 4 door, vehicle identification number 1FMPU18L5XLB44896.

28. A 1999 GMC Suburban, 4 door, vehicle identification number 3GKFK16R9XG505898.

29. A 1999 Jeep Wrangler Sahara, 2 door, vehicle identification number 1J4FY49S7XP432482.

30. A 1999 Lamborghini, 2 door, vehicle identification number ZA9RU31B4XLA12182.

31. A 1999 Lotus Espirit 13, vehicle identification number SCCDC082XXHA15679.

32. A 1999 Mercedes Benz, 4 door, vehicle identification number, WDBJF65H5XA743759.

33. A 1999 Porsche Boxter, 2 door, vehicle identification number WP0CA298XXU628634.

34. A 1999 Toyota Corolla LE, 4 door, vehicle identification number 2T1BR12E6XC108684.

35. A 1999 Bentley, 4 door, vehicle identification number SCBLB51E2XCX02511.

36. A 1957 Chevrolet Bel Air, 2 door, vehicle identification number VC57F221853.

37. A 1997 Harley Davidson motorcycle, vehicle identification number 1HD1BRL15VY046728.

38. A 1997 Harley Davidson motorcycle, vehicle identification number 1HD1BRL16VY057785.

39. A 1998 Harley Davidson motorcycle, vehicle identification number 1HD1BML4XWY036226.

40. A 1997 Bombardier Speedster, hull identification number CECB1333B797, Florida registration number FL7180KN.

41. A 1998 10' 5" Bombardier Sea-Doo, hull identification number ZZN86359A898 and Florida registration number FL9248KN.

42. A 1998 10' 5" Bombardier Sea-Doo, hull identification number ZZN86351A898 and Florida registration number FL9249KN.

43. 1998 10' 5" Bombardier Sea-Doo, hull identification number ZZN86343A898 and Florida registration number FL9247KN.

44. A 1998 10' 5" Bombardier Sea-Doo, hull identification number ZZN86281A898 and Florida registration number FL9250KN.

45. A 1998 Bombardier Challenger, hull identification number CECA0292A898.

46. A 1998 Shor Trailer, identification number 1MDHN5N19WA990607.

47. A 1998 Shor Trailer, identification number 1MDCM3K17VA906045.

48. A 1939 Red Studebaker.

49. A 1940 Ford Coupe, vehicle identification number 54544029.

50. A 1941 Beige Chevrolet, vehicle identification number AG6761.

51. A 1955 Black Chevrolet, vehicle identification number B55L008873.

52. A 1998 Jeep Cherokee, vehicle identification number 1J4GZ88Z2WC333758.

53. A 1999 Plymouth Prowler, vehicle identification number 1P3EW65G6XV501923.

54. A 1999 Plymouth Prowler, vehicle identification number 1P3EW65GXXV500788.

55. A Kit Car, vehicle identification number 1Z37K25516228.

56. Cashiers check number 132405 in the amount of $20,000.00 and its proceeds which represent the proceeds from the sale of a 1957 Ford Fairlane D7KW16856G.

57. Cashiers check number 132406 in the amount of $36,500.00 and its proceeds which represent the proceeds from the sale of a 1999 Plymouth Prowler, vehicle identification number 1P3EW65G5XV501685.

pursuant to Title 18, United States Code, Section 982.

If any of the above-described forfeitable property, as a result of any act or omission of the defendants:

a) cannot be located upon the exercise of due diligence;

b) has been transferred or sold to, or deposited with, a third person;

c) has been placed beyond the jurisdiction of the Court;

d) has been substantially diminished in value; or

e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Section 982(a)(1), and Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendants up to the value of the property listed above as being subject to forfeiture.

All in violation of Title 18, United States Code, Section 982(a)(1), and Title 21, United States Code, Section 853(p).

A true bill.

/s/ Daryl B. Kilpatrick 12-13-00
Foreperson
DARYL B. KILPATRICK

/s/ Bruce E. Reinhart for
GUY A. LEWIS
UNITED STATES ATTORNEY

/s/ Ellen L. Cohen
ELLEN L. COHEN
ASSISTANT UNITED STATES ATTORNEY

/s/ Stephen Carlton
STEPHEN CARLTON
ASSISTANT UNITED STATES ATTORNEY

Supreme Court, U.S.
FILED
JUN 13 2005
OFFICE OF THE CLERK

(3)

No. 04-1224

In the Supreme Court of the United States

GARLAND HOGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit abused its discretion by applying an established procedural-default rule to decline to consider claims of error under *United States* v. *Booker*, 125 S. Ct. 738 (2005), where the claim was first raised in the court of appeals in a petition for rehearing.

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In the Supreme Court of the United States

No. 04-1224

GARLAND HOGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-43) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2004. A petition for rehearing was denied on December 17, 2004 (Pet. App. 55-56). The petition for a writ of certiorari was filed on March 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner and several co-defendants were charged in a 52-count superseding indictment with a variety of fraud and money laundering activities related to their involvement with a fraudulent viatical investment com-

pany scheme. Pet. App. 2-3. In 1996, Zane Balsam and Alan Lewis created Viatical Federated Trust Company (which was renamed "FinFed") and began the viatical investment scheme. Petitioner Garland Hogan served as FinFed's in-house counsel. The conspirators falsely promised investors that their money would be used to purchase viatical[1] insurance benefits; that investors would receive a 42 percent return within 36 months if the insured died; that a FinFed attorney would ensure that the trust and escrow facilities used in handling the investment funds met industry standards; that each investment was a "guaranteed receivable" from an insurance company; that each investment was protected by a fidelity bond; and that a medical overview had been performed on each of the insureds whose policies were purchased. *Ibid.* Instead of using the investors' money to buy insurance benefits, however, the conspirators spent the investors' money to benefit themselves and their friends and relatives. In all, investors lost more than $100 million dollars in the scheme. *Ibid.*[2]

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[1] A viatical sale involves purchasing a beneficial interest in a life insurance policy of a terminally ill person for a percentage of the face value of the policy. Pet. App. 2 n.1.

[2] In the third superseding indictment, petitioner was charged with conspiracy to commit mail fraud, in violation of 18 U.S.C. 1341, 1343, and 371 (Count 1); nine substantive counts of mail fraud, in violation of 18 U.S.C. 1341 and 2 (Counts 5-12 and 14); conspiracy to launder proceeds of illegal activity, in violation of 18 U.S.C. 1956(h) (Count 15); participating in financial transactions with mail and wire fraud proceeds and with the intent to conceal or disguise the source or ownership of the proceeds, in violation of 18 U.S.C. 1956(a)(1)(B) (Count 16); engaging in monetary transactions with mail and wire fraud proceeds of a value greater than $10,000, in violation of 18 U.S.C. 1957 (Count 50). Count 52 involved the forfeiture of all the defendants' interest in real and personal property involved in the charged offenses. Pet. App. 2-4.

The jury found petitioner guilty on all charges. The district court sentenced petitioner to a total of 324 months of imprisonment. Pet. App. 4-5.

2. In his opening brief on appeal, petitioner argued that the evidence was insufficient to support his convictions, that prosecutorial misconduct required reversal of his conviction, that he received constitutionally ineffective assistance of counsel, and that several sentencing enhancements he received were not supported by the record. Although petitioner argued (unsuccessfully) before the district court that *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), required facts supporting sentencing enhancements to be proved beyond a reasonable doubt rather than by a preponderance standard, see 3/26/02 Sent. Tr. 264-265, 4/1/02 Sent. Tr. 406, petitioner made no argument before the court of appeals challenging the constitutionality of using judicially found facts to apply the Sentencing Guidelines.[3] The court of appeals affirmed the convictions and sentences of petitioner and each of his co-defendants. See Pet. App. 1-43.

On the day the court of appeals issued its decision in this case, this Court decided *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). Petitioner then filed motions for rehearing and for rehearing en banc, and moved to join the motions of co-defendant Richard Lewis for leave to file

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[3] Petitioner's co-defendant Zane Balsam argued before the court of appeals that the district court violated *Apprendi* by imposing sentence under Count 15 after applying the higher base offense level prescribed for "promotion money laundering" rather than the lower base offense level for "concealment money laundering" based on judge-found facts about the object of the conspiracy. Balsam C.A. Br. 52-61. Although several of Balsam's other co-defendants moved to adopt that argument, see Fed. R. App. P. 28(i) (permitting parties to "adopt by reference a part of another's brief"), petitioner evidently did not do so.

a supplemental brief, to raise a claim he had not previously made to the court of appeals, *i.e.*, that the use of judge-found facts in applying the Guidelines violated the Sixth Amendment. Pet. 4-5; C.A. Docket, entries for 7/6/04, 7/15/04.

The court of appeals granted petitioner's motion to adopt Lewis's motion for leave to file a supplemental brief, Pet. App. 44, but denied his petition for rehearing and his motion for leave to file a supplemental brief, citing circuit precedent establishing that a party may not raise for the first time in a petition for rehearing or in a supplemental brief an issue not raised in his principal brief. See *id.* at 44-45 (citing *United States* v. *Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001), cert. denied, 535 U.S. 1098 (2002); *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.), cert. denied, 533 U.S. 962 (2001) and 535 U.S. 979 (2002); *United States* v. *Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001)); *id.* at 55-56.

3. In *United States* v. *Booker*, 125 S. Ct. 738 (2005), this Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *Id.* at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (Breyer, J., for the Court).

4. In *United States* v. *Dockery*, 401 F.3d 1261 (2005) (per curiam), the Eleventh Circuit held, in a case that this Court had remanded for reconsideration in light of *Booker*, that the defendant would be deemed to have abandoned his Sixth Amendment challenge to the Guidelines by failing to raise it in his opening brief. *Id.* at

1262-1263. The court of appeals stated that it saw nothing

> in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the * * * issue had been timely raised in this Court. In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Ibid. (quoting *Ardley*, 242 F.3d at 990); accord, *e.g.*, *United States* v. *Mosley*, No. 04-11189, 2005 WL 1317026 (11th Cir. June 2, 2005) (reinstating original judgment after this Court granted certiorari, vacated judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Senn*, 128 Fed. Appx. 96 (11th Cir. 2005) (same).

ARGUMENT

Petitioner contends (Pet. 16-17) that the Eleventh Circuit's decision not to entertain *Booker* and *Blakely* claims that are not raised in a party's initial brief contravenes the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987),[4] and is inconsistent with the principles of plain error review embodied in Federal Rule of Criminal Procedure 52(b). Pet. 19-21. Petitioner also contends (Pet. 18-19) that the Eleventh Circuit's position conflicts with "the law in every other circuit." Pet. 18. Finally, petitioner contends (Pet. 5-10) that his petition for a writ of certiorari should be

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[4] This issue has been raised by one of petitioner's co-defendants. See *Tirado* v. *United States*, petition for cert. pending, No. 04-9307 (filed Mar. 15, 2005).

granted, the judgment of the court of appeals vacated, and remanded for further consideration in light of *Booker*. None of those contentions has merit. Further review is not warranted.

1. a. In *Griffith*, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in *Griffith* had preserved the claim on which he sought review, the Court did not have occasion to consider the interplay between the retroactivity rule adopted in that case and principles of waiver, forfeiture, and other prudential doctrines. See *id.* at 317, 318.

Application of procedural default rules is consonant with the retroactivity principle of *Griffith*. *Griffith* concluded that retroactive application of new rules on direct appeal was necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 322-323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" (*id.* at 323) to those who have. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system" and "[t]he other has not"). Application of procedural bar rules does not offend principles requiring the retroactive application of new constitutional rules to cases open on direct review.

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situation because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and commands underlying the issue that is held to be defaulted.

United States v. *Ardley*, 273 F.3d 991, 992 (11th Cir. 2001) (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 533 U.S. 979 (2002).

On several occasions, this Court has indicated that the retroactivity principle embodied in *Griffith* is in no way inconsistent with the application of procedural default rules. In *Shea* v. *Louisiana*, *supra*, for example, the Court held that the rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. 470 U.S. at 59. In doing so, the Court explicitly noted that the retroactive application of *Edwards* was "subject, of course, to established principles of waiver, harmless error, and the like." *Id.* at 58 n.4. Similarly, in *Booker* itself, the Court stated that while courts were bound to apply its holding "to all cases on direct review," 125 S. Ct. at 769 (citing *Griffith*, 479 U.S. at 328), "we expect reviewing courts to apply ordinary prudential doctrines," including, specifi-

cally, the plain error doctrine for claims that have not been preserved. *Ibid.* See also *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (noting that rule of *United States* v. *Gaudin*, 515 U.S. 506 (1995), applied retroactively under *Griffith*, but unpreserved claims were subject to review only for plain error); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 104 n.1 (1993) (Scalia, J., concurring) (noting, as the Court extended the holding of *Griffith* to civil cases, that "a party may procedurally default on a claim in either [the civil or criminal] context").[3] This Court has never suggested the contrary.

b. Petitioner contends (Pet. 19-21) that the decision below is inconsistent with the principles of plain-error review reflected in Rule 52(b) of the Federal Rules of Civil Procedure. That argument lacks merit. As the Court observed in *United States* v. *Olano*, 507 U.S. 725 (1993), "'[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Id.* at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). In *Olano*, this Court observed that Rule 52(b) provides only "a limited power to correct

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[3] Accord, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 442 (6th Cir. 2002) (noting that although *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to plain error review); *United States* v. *Oaten*, 286 F.3d 622, 634 (2d Cir. 2002) (same); *United States* v. *Wheat*, 278 F.3d 722, 739 (8th Cir. 2001) (same), cert. denied, 537 U.S. 850 (2002); *United States* v. *Keys*, 133 F.3d 1282, 1285-1286 (9th Cir.) (en banc) (holding that although rule of *Gaudin* applied retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to review only for plain error), cert. denied, 525 U.S. 891 (1998).

errors that were not timely raised in district court." *Ibid.* The Court did not indicate that Rule 52(b) prescribed the *sole* procedural bar rule that courts could employ and that courts could adopt no additional procedural requirements. And in *Booker*, the Court said that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test." 125 S. Ct. at 769 (emphasis added). *Booker*'s language clearly implied that "plain error" is only one of a number of "prudential doctrines" that may preclude relief; waiver is another.

Although this Court observed in *Olano* that "Rule 52(b) should be employed 'in those circumstances in which a miscarriage of justice would otherwise result,'" 507 U.S. at 736 (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)), nothing in the Eleventh Circuit's application of its procedural bar rule is inconsistent with that statement. The court of appeals has addressed claims of *Booker* error although they were not raised in the defendant's opening brief where the government has conceded the error. See *United States* v. *Dacus*, No. 04-15319, 2005 WL 1017985, at *1 (11th Cir. May 3, 2005) (per curiam) ("Although we ordinarily refuse to consider an argument not raised in an initial brief, we consider the argument that Dacus's sentence was erroneous under *Booker* because both parties have joined the issue without objection.") (citing *United States* v. *Levy*, 379 F.3d 1241, 1242-1243 (11th Cir. 2004), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005)). In addition, the Eleventh Circuit has explicitly recognized that it has the authority to relieve litigants of the consequences of failing to raise an issue in an opening brief and to address an issue on the merits where manifest injustice would

otherwise result."[6] The court has specifically determined that "'there would be no miscarriage of justice if we decline to address' *Blakely*-type issues not raised in opening briefs on appeal." See *Levy*, 379 F.3d at 1243 n.3 (quoting *McGinnis* v. *Ingram Equip. Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990)).

2. Petitioner contends (Pet. 18-19) that the Eleventh Circuit's application of its procedural bar rule conflicts with the law of every other courts of appeals, and that Supreme Court review is necessary to resolve the circuit conflict.

a. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have without exception interpreted that provision to establish a general prudential rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." *Playboy Enters.* v. *Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[7] The courts

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[6] See, *e.g.*, *United States* v. *Rivera Pelau*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2 of the Federal Rules of Appellate Procedure, considering an issue raised only in co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's arguments); *Gramegna* v. *Johnson*, 846 F.2d 675 (11th Cir. 1988) (vacating judgment based on issue raised sua sponte by the court, pursuant to Rule 2); *United States* v. *Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does."), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005).

[7] Accord, *e.g.*, *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argument unless manifest injustice otherwise would result.") (internal

of appeals have recognized that that rule is not jurisdictional, and therefore that courts have authority, in the exercise of their discretion, to address issues not timely raised by the parties. See, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (5th Cir. 2001) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion" and that the court may consider an issue that was not timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 1086

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citations and quotation marks omitted); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000) ("It is well settled that if an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting *Kost* v. *Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993)) (alterations omitted); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir. 2001) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting *Priddy* v. *Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.) (finding arguments not raised in initial brief waived), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Fort Smith*, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (holding that "[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing).

(2002); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review issue not raised in the brief where manifest injustice would otherwise result); *Lee* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (same). See also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause"). As noted above, see pp. 9-10, *supra*, the Eleventh Circuit specifically has recognized that it has the authority to relieve litigants of the consequences of default and address an issue on the merits where manifest injustice would otherwise result. In the exercise of its discretion, however, the Eleventh Circuit has declined to exempt *Booker* and *Blakely* claims from the operation of its longstanding rule that it will not consider claims unless they were timely raised in the appellant's opening brief. See, *e.g.*, *United States* v. *Dockery*, 401 F.3d 1261, 1262 (11th Cir. 2005) (involving *Booker* claims); *Levy*, 379 F.3d at 1243 n.3; see also *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.) (declining to exempt claims under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), from operation of rule), cert. denied, 533 U.S. 962 (2001).

Petitioner asserts (Pet. 18) that the Eleventh Circuit's application of the procedural bar rule "conflicts with the law in every other circuit" because other courts have reviewed the merits of challenges based on the intervening decisions of this Court in *Booker*, *Blakely*, and *Apprendi*, even if those challenges were not raised in the defendant's opening brief. The vast majority of decisions petitioner cites are inapposite. A few of the cited opinions simply conclude that it was appropriate under the circumstances to consider those claims in that posture because this Court recently had clarified the law, without citing or discussing the ordinary rule that courts will not entertain issues not raised in a party's opening

brief.[8] Most of the others simply discuss (and often reject) claims raised in supplemental briefs without even discussing the appropriateness of reviewing tardily raised claims.[9] Thus, it appears that most courts that have addressed claims in this posture have not explicitly declined to apply the procedural bar rule, and those decisions cannot be said to "conflict" with the decision below.

Petitioner cites only two cases (Pet. 18-19 & n.8) in which courts entertained a claim raised for the first time in supplemental briefing in light of intervening decisions of this Court that explicitly considered whether to apply the ordinary prudential rule that issues not raised in an opening brief will be deemed abandoned. That pur-

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[8] See *United States* v. *Oliver*, 397 F.3d 369, 377 n.1 (6th Cir. 2005) (concluding that it was appropriate to consider claim raised in letter filed pursuant to Fed. R. App. P. 28(j)); *United States* v. *Castro*, 382 F.3d 927, 929 & n.3 (9th Cir. 2004) (concluding that it was appropriate to consider claim sua sponte).

[9] See *United States* v. *Fox*, 396 F.3d 1018 (8th Cir. 2005); *United States* v. *Bruce*, 396 F.3d 697 (6th Cir.), vacated in part on reh'g, 405 F.3d 1034 (6th Cir. 2005); *United States* v. *Burgess*, 119 Fed. Appx. 852 (8th Cir. 2005); *United States* v. *Schaefer*, 384 F.3d 326, 330-331 (7th Cir. 2004); *United States* v. *Moore*, 109 Fed. Appx. 503, 505 n.2 (3d Cir. 2004) (denying motion to file supplemental brief "as futile" because claims of error were clearly meritless); *United States* v. *Delgado*, 256 F.3d 264, 280 (5th Cir. 2001); *United States* v. *Cernobyl*, 255 F.3d 1215 (10th Cir. 2001); *United States* v. *Terry*, 240 F.3d 65, 72-73 (1st Cir.), cert. denied, 532 U.S. 1023 (2001); *United States* v. *Poulack*, 236 F.3d 932, 935-938 (8th Cir.), cert. denied, 534 U.S. 864 (2001); *United States* v. *Rogers*, 118 F.3d 466, 471 (6th Cir. 1997). *United States* v. *Hammoud*, 381 F.3d 316, 344 & n.14 (4th Cir. 2004) (en banc), vacated on other grounds, 125 S. Ct. 1051 (2005), is inapposite because the supplemental briefing on *Blakely* in that case merely supported a timely *Apprendi* challenge that the defendant raised in his opening brief to judicial factfinding under the Guidelines.

ported conflict does not warrant this Court's consideration. Both cases discussed the issue only briefly in footnotes. See *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005); *United States* v. *Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984). The court in *Washington*, without the benefit of briefing or argument on the subject by the parties, concluded that this Court's opinion in *Booker* "specifically mandated that [courts of appeals] 'must apply [*Booker*] . . . to all cases on direct review,'" 398 F.3d at 312 n.7 (quoting *Booker*, 125 S. Ct. at 769 (Breyer, J., for the Court)) (alterations in *Washington*), without noting that, in the very same paragraph, *Booker* made clear that "we expect reviewing courts to apply ordinary prudential doctrines" in determining whether resentencing in a given case was warranted. 125 S. Ct. at 769 (Breyer, J., for the Court). The Fourth Circuit should be given an opportunity to reconsider that erroneous conclusion in an appropriate case.[10] The *Byers* decision is over twenty years old, and the court may have exercised its discretion to proceed to the merits of the argument in that case only because the court concluded it clearly lacked merit. See 740 F.2d at 1118 ("obvious" that conditions necessary for relief not met); *id.* at 1121 (noting claim has been "uniformly rejected by other circuits"). More recent decisions of that court suggest that it does not consider itself obligated to consider tardily raised claims based on intervening precedent. See *Kinney* v. *District of Columbia*, 994 F.2d 6, 10 (D.C. Cir. 1993) (citing *Byers* for the proposition that "we have indicated that we *might* entertain a new argu-

[10] The government was unable to seek rehearing in *Washington* because the court of appeals, after the time for filing a petition for rehearing had expired, denied the timely filed joint motion of the parties for an extension of time in which to file a rehearing petition.

ment on appeal if it were justified by * * * an intervening change in the law") (emphasis added).

Review also is not warranted at this time because several courts of appeals currently are refining their analysis of when it is appropriate to consider tardily raised claims based on intervening precedent. The Fifth Circuit, which previously had entertained tardily raised claims based on intervening Supreme Court precedents,[11] recently has followed Eleventh Circuit precedent to conclude that "absent extraordinary circumstances, we will not consider *Booker* issues raised for the first time in a petition for rehearing." *United States* v. *Taylor*, No. 03-10167, 2005 WL 1155245 (5th Cir. May 17, 2005) (per curiam) (citing, *inter alia*, *Ardley*); *United States* v. *Hernandez-Gonzalez*, 405 F.3d 260, 261-262 (5th Cir. 2005) (per curiam) (citing, *inter alia*, *Levy*, 379 F.3d at 1242, and *Ardley*). The First Circuit, on the other hand, only last month concluded that the "substantial change in the applicable law wrought by the Supreme Court's decisions in *Blakely* and *Booker* * * * constitutes an 'exceptional circumstance'" in which the court would decline to apply its general rule that tardily raised issues "are generally considered waived." *United States* v. *Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005).

b. Even if the courts of appeals were to settle on differing approaches to when to address claims not raised in a defendant's opening brief, rules governing the consideration of unpreserved claims may appropriately be viewed as local rules that can differ from circuit to circuit. So long as such local rules are reasonable, see

[11] See *Miranda*, 248 F.3d at 443-444 (discussing *Apprendi* claim although defendant did not raise claim in opening brief); *United States* v. *Garcia*, 242 F.3d 593, 599 & n.5 (5th Cir. 2001) (same).

Thomas v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [such] rules." *Ortega Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). Indeed, this Court specifically has acknowledged the power of courts of appeals to adopt rules restricting the consideration of issues not raised in a timely manner. In *Thomas* v. *Arn*, *supra*, this Court held that the Sixth Circuit had not abused its discretion by promulgating a rule that a party waived the right to appellate review of a district court judgment that adopted a magistrate's recommendation when the party had failed to file objections with the district court identifying those issues on which review was desired. The Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." 474 U.S. at 147-148, 155. Noting that such a rule was supported by sound considerations of judicial economy, *id.* at 148, this Court concluded that the courts of appeals had authority to adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.* at 146-147 (quoting *Capp* v. *Naughten*, 414 U.S. 141, 146 (1973)).

Procedural bar rules of the sort at issue here promote efficiency by avoiding piecemeal briefing of appeals and ensuring that the appellee has the opportunity to respond to all issues raised by the appellant without supplemental briefing. Such rules are especially important because of the courts of appeals' increasingly heavy

caseloads. Petitioner contends (Pet. 13 n.4, 22) that the court of appeals' rule should be rejected because it would give litigants an incentive to raise numerous claims that are precluded by existing precedent. Although the same could be said of any procedural default rule that attaches consequences to the failure to raise a claim, this Court rejected the position that the futility of raising a claim under existing law wholly excuses a litigant from preserving it. See, *e.g.*, *Johnson*, 520 U.S. at 467-468 (reviewing unpreserved claim only for plain error although the argument was foreclosed by "near-uniform precedent both from this Court and from the Courts of Appeals"). See also *United States* v. *Levy*, 391 F.3d 1327, 1332 (11th Cir. 2004) (Hull, concurring in the denial of rehearing en banc) ("If defendants were going to raise a long and useless laundry list of objections, they already would have been doing exactly that in the district court so objections could receive full *de novo* review [on appeal], rather than plain-error review."), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005); *id.* at 1333 (noting that "numerous defendants" had properly preserved their claims by "rais[ing] *Apprendi*-type arguments in their challenges to enhancements under the federal Sentencing Guidelines") (collecting cases).

This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decisions in *Blakely* or *Apprendi* solely because it was not raised in the petitioner's opening brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284), and denied review in several cases that specifically challenged application of the procedural bar rule in that context. See,

e.g., *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (challenging application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

3. Petitioner also contends (Pet. 5-10) that "this Court should grant the petition for a writ of certiorari, vacate the judgment, and remand the case to the Eleventh Circuit for further consideration in light of *Booker*." Pet. 6. This Court previously granted, vacated, and remanded for further consideration in light of *Booker* in a case involving one of petitioner's co-defendants, see *Pierce* v. *United States*, 125 S. Ct. 1430 (2005) (No. 04-8442), and has recently done so in other cases raising the same issue. See *Heabree* v. *United States*, No. 04-1210, 2005 WL 575559 (June 13, 2005); *Dixon* v. *United States*, No. 04-8932, 2005 WL 540062 (June 6, 2005); *Levy* v. *United States*, No. 04-8942, 2005 WL 540692 (June 6, 2005). Because the court of appeals confirmed in *United States* v. *Dockery*, 401 F.3d at 1262, that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned, there is no reason for this Court to remand petitioner's case for reconsideration in light of *Booker*. Accord, *e.g.*, *United States* v. *Mosley*, No. 04-11189, 2005 WL 1317026 (11th

Cir. June 2, 2005) (reinstating original judgment after this Court granted certiorari, vacated judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Senn*, 128 Fed. Appx. 96 (11th Cir. 2005) (same); see also *Taylor*, 2005 WL 1155245, at *1 (on remand from this Court for reconsideration in light of *Booker*, Fifth Circuit reinstated original judgment because defendant raised *Booker* argument for the first time in petition for a writ of certiorari and "extraordinary circumstances" did not warrant relief).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

GARLAND HOGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY IN SUPPORT OF HOGAN'S PETITION FOR WRIT OF CERTIORARI

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REPLY ARGUMENT

Introduction

The Solicitor General's ("Respondent") response[1] is a tale of two briefs. On the one hand it asserts that Mr. Hogan's petition should be denied outright because the Eleventh Circuit's procedural default rule is not as rigid as Hogan makes it out to be (Response at p. 6, 10). On the other hand, it contends that the Court should not remand the case, as it has done in every similar case, because the Eleventh Circuit rule is so rigid that Mr. Hogan will never obtain relief in the court below (Response at p. 18).

The Response demonstrates that, at the very least, the Court should grant Mr. Hogan's petition for writ of certiorari, vacate the judgment below and remand for further proceedings as the Court has done in every similar case, including the co-petitioners in this case (Response at p. 18). In the alternative, the Court should grant the writ of certiorari to settle the admitted circuit split on this issue (Response at p. 13-15) and to correct the anomalous rule in the Eleventh Circuit that ignores this Court's cases. *See United States v. Vanorden*, No. 03-11083, 2005 WL 1531151 at *16 (11th Cir. June 30, 2005) (Tjoflat, J. specially concurring) ("Hopefully, . . . the Supreme Court will soon correct this practice," which former Chief Judge Tjoflat describes as both "strange [and] bad").

Judge Tjoflat, continuing to express his frustration with the Eleventh Circuit's outlandish rule, recently asked this Court to correct this practice, arguing:

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[1] We will cite to Respondent's response as follows: "Response at p.___".

> This is a strange rule we have: in a case in which the Supreme Court has vacated our decision 'for further consideration in light of [Booker]' precisely *because* we did not have the benefit of *Booker* when we rendered our first decision, we decline to actually consider the *Booker* issue on the ground that it was not raised when we issued that first decision. As I have explained elsewhere, it is also a very bad rule, as it is not only inconsistent with Supreme Court precedent and the law of every other circuit, but also encourages defendant-appellants to raise frivolous claims that are squarely foreclosed by circuit and Supreme Court precedent on the off chance that an unanticipated decision will make them suddenly viable.

Id. at *5-6 (citations omitted).

1. As an initial matter, Mr. Hogan's sentence was indisputably increased by a judge's factual findings by a preponderance of the evidence rather than by a jury's findings based on a beyond a reasonable doubt standard, over Hogan's *Apprendi* objection at sentencing. Respondent does not dispute that this sentence, determined under mandatory Federal Sentencing Guidelines, violates both the Sixth Amendment and this Court's decisions in *United States v. Booker*, 125 S. Ct. 738 (2005) and *Blakely v. Washington*, 124 S. Ct. 2531 (2004). Respondent also concedes that this Court previously has granted petitions for a writ of certiorari, vacated judgments, and remanded similar cases and the cases of co-petitioners for further consideration in light of *Booker*,[2] (Response at p. 20), and

[2] *See United States v. Pierce*, 125 S. Ct. 1430 (2005) (co-defendant to Garland Hogan); *Hembree v. United States*, No. 04-1210, 2005 WL

(Continued on following page)

has recommended that this Court do so for co-petitioners in which petitions for certiorari are pending.[3]

Nevertheless, Respondent contends that this Court should single out Mr. Hogan and deny review in his case because Mr. Hogan did not adopt the *Apprendi* argument of his co-petitioners in the court below. *Id.*[4] Respondent, however, simply missed the fact that Mr. Hogan *did* move to adopt "all" arguments, motions, petitions, and pleadings filed by co-appellants. *See* C.A. Docket Entries for 7/22/04, attached as App. 121-124. The Eleventh Circuit granted this motion on December 17, 2004. *See* C.A. Docket Entries for 12/17/04 at App. 44-45. ("Appellants' motions to adopt are GRANTED.").[5] Accordingly, there is no reason for Respondent to pick on Mr. Hogan as he (just like his

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575559 (June 13, 2005); *Dixon v. United States*, No. 04-8932, 2005 WL 540062 (June 6, 2005); *Levy v. United States*, 125 S. Ct. 2542 (2005) No. 04-8942, 2005 WL 540692 (June 6, 2005), opinion reinstated in *Levy v. United States*, No. 01-17133 2005 WL ___ (11th Cir. July 12, 2005).

[3] *See, e.g.*, Consolidated Brief for the United States in *Alan Richard Lewis, Wanda Tirado, and Zane Balsam v. United States*, Nos. 04-9239, 04-9307 and 04-9331.

[4] *See* Respondent Br. at p. 3, n.3 (mistakenly stating that Hogan, unlike the other petitioners, "evidently did not" adopt co-defendant Balsam's *Apprendi* argument in the court of appeals).

[5] When undersigned counsel informed Respondent of this motion and order, Respondent took the position that motion to adopt "all" co-defendants' previously filed pleadings, motions and arguments was only a motion to adopt "some" pleadings. The definition of the word "all", however, can hardly be in dispute. *See* www.dictionary.com (defining the word "all" as "being or representing the entire or total number, amount, or quantity"; "being the utmost possible"; and "any whatsoever, beyond all doubt"). There is no dispute that Petitioner's motion to "adopt any and all pleadings filed by his co-appellants," *see* App. 122, was granted by the Eleventh Circuit.

co-petitioners) adopted the *Apprendi* argument made by co-defendant Balsam.

Even if Hogan did not adopt the arguments of co-petitioners (which he clearly did), this Court should remand for further consideration as it has done with countless other similarly situated petitions. Respondent argues that a remand would be fruitless due to the Eleventh Circuit's procedural default rule. This Court rejected the exact same argument in *Levy v. United States*, 125 S. Ct. 2542 (2005) (GVRing case over Solicitor General's objection that a GVR would be futile). And the Court did so for good reason – Respondent's reasoning prematurely presumes the outcome of the lower court's decision on remand, especially in this case where at least some, if not all, of the co-petitioners have preserved the issue. *See, e.g., United States v. Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2 of the Federal Rules of Appellate Procedure, considering an issue raised only in a co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's arguments, to prevent manifest injustice). Accordingly, there can be no real dispute that at a bare minimum, this Court should grant Mr. Hogan's petition, vacate his sentence, and remand his case to the Eleventh Circuit for further consideration.

2. If Respondent's guess is correct – that on remand the Eleventh Circuit will simply reapply its anomalous procedural default rule – it demonstrates that review is necessary so that the Court: 1) can ensure that its cases are being followed and not ignored (as is being done by the Eleventh Circuit); 2) can settle a circuit split on the issue; and 3) can preserve judicial and litigant resources that are required to deal with frivolous issues under the Eleventh Circuit rule.

a. The Eleventh Circuit's procedural default rule conflicts with *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Booker* itself. *See* Hogan's Pet. at pgs. 16-17. Respondent's attempt to distinguish *Griffith* by arguing that the defendant there actually raised the issue below is simply not an accurate distinction as Mr. Hogan raised the *Apprendi* argument before the sentencing judge and (as explained above) preserved it in the court of appeals.

In any event, neither *Griffith* nor *Booker* require a litigant to have raised the issue below. *See, e.g., Booker*, 125 S. Ct. at 769 (holding that the two rules announced in *Booker* "must" be applied to "all cases" on direct review); *Griffith*, 479 U.S. at 328 ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final."). Respondent correctly points out that the *Booker* court "expect[ed] reviewing courts to apply ordinary prudential doctrines" *Booker*, 125 S. Ct. at 769, but the Eleventh Circuit's rule is anything but ordinary or prudential. *See Vanorden*, 2005 WL 1531151 at *8 (Tjoflat, J., specially concurring) (finding that the rule "is not an 'ordinary prudential doctrine'; in fact, it is a quite extraordinary rule in that we invented it only four years ago and it has not been followed by any other circuit").

Respondent's citation (at p. 7) to *Shea v. Louisiana*, 470 U.S. 51, 58 n.4 (1985), for the proposition that *Griffith* and *Booker* are "subject, of course, to established principles of waiver, harmless error, and the like" is without merit as those qualifications of the general principle do not implicate this case. As explained below, Mr. Hogan cannot be said to have done anything that can plausibly be construed as a "waiver." Regardless, *Shea*, decided two years before *Griffith*, involved the appropriateness of

treating defendants bringing claims under collateral review differently from those raising claims under direct review. *Id.* at 60-61. The Court reasoned that "the distinction . . . properly rests on considerations of finality in the judicial process." *Id.* at 59. The Court did not suggest that defendants, who raise previously unavailable claims in supplemental briefs, are not similarly situated to defendants who raised previously known claims. The *Shea* Court did not implicate the *Griffith/Booker* rule that a new decision concerning the conduct of criminal prosecutions applies to all cases on direct review, such as Mr. Hogan's case.

b. The Eleventh Circuit's position also conflicts with *United States v. Olano*, 507 U.S. 725 (1993) and Rule 52(b) of the Federal Rules of Criminal Procedure. Hogan's Pet. at pgs. 19-21. Respondent takes issue with this claim asserting that one prudential doctrine in *Booker* and *Griffith* is waiver. (Response at p. 9). There is no question that waiver can and should be considered. But waiver certainly does not apply to Hogan's case or any of the other litigants in the Eleventh Circuit who are being subjected to its anomalous rule. Hogan has done nothing that can plausibly be construed as waiver. As this Court has explained, "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a *known* right.'" *Olano*, 507 U.S. at 733 (emphasis added). Judge Tjoflat explains in the *Vanorden* case this exact point, which applies with equal force to Hogan's case:

> Thus, while Vanorden did forfeit his *Booker* claim by failing to 'timely assert[]' it – which means that review in his case should be for plain error only – it is clear that he has not 'waived' it. At

> the time the supposed waiver took place – when Vanordern's lawyer filed his initial brief in April 2003 – *Blakely and Booker* had not yet been decided, and this circuit and every other had squarely rejected *Blakely/Booker*-type arguments. It, therefore, makes no sense to say that Vanorden 'intentional[ly] relinquish[ed]' a 'known' Sixth Amendment right.

Vanorden, 2005 WL 1531151 at *9. *See also* Hogan Pet. at 19-21 (making the same point). Respondent's failure to address the difference between waiver and forfeiture demonstrates the strength of Hogan's position.

c. Respondent takes issue with our claim that the Eleventh Circuit's procedural default rule conflicts with the other circuits' decisions. This Court need not take our word for it. Take Judge Tjoflat's word: "[The rule in the Eleventh Circuit] is . . . inconsistent with Supreme Court precedent and the law of *every* other circuit." *Vanorden*, 2005 WL 1531151 at *8 (emphasis added).

Respondent does concede that a conflict exists between the Eleventh Circuit on one side and a number of other circuits on the other side. Respondent Br. at p. 14-15 (citing *United States v. Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) ("Although appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review.'" (citation omitted); *United States v. Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984) (Scalia, J.); *United States v. Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005) ("[S]ubstantial change in the applicable law wrought by the Supreme Court's decisions in *Blakely* and *Booker* . . . constitutes an

'exceptional circumstance'" in which the court would decline to apply any default rule)). The Ninth Circuit also recently joined these circuits in the one-sided circuit conflict. *See United States v. Ameline*, 2005 WL 1291977, at *11 (9th Cir. June 1, 2005) (en banc) ("*Booker* explicitly stated that its holding applies to all cases pending on direct appeal. . . . Even where the briefs filed by the parties do not raise a *Booker* objection, we conclude that the issue may be raised and should be considered."). At the very least then, there is a 4-1 circuit split on the issue. But the split is even more stark than that.

Respondent suggests that the other conflicting circuit cases are not true conflicts because in those cases the courts "simply discuss the claims raised in supplemental briefs without even discussing the appropriateness of reviewing tardily raised claims." (Response at p. 14, n.9). First, Respondent clearly erred in listing *United States v. Rogers*, 118 F.3d 466 (6th Cir. 1997) among in this group of cases. In *Rogers*, the Sixth Circuit discussed the procedural bar rule at length, determining that the defendant "could not have knowingly waived a constitutional right that evolved after he filed his appellate brief because raising the issue would have been futile in light of then-applicable precedent." *Id.* at 471. The split, at the very least, therefore, is 5-1.

The Second, Third, Fifth,[6] Seventh, and Eighth Circuits also have permitted litigants to raise issues for the first time after the initial brief has been filed in

[6] *But see United States v. Taylor*, No. 03-10167, 2005 WL 1155245 at *1 (May 17, 2005) (concluding that "absent extraordinary circumstances, [it would] not consider *Booker* issues raised for the first time in a petition for rehearing").

situations like this one. *See* Hogan Pet. at n.8, 9. In each of these cases, the courts considered issues first raised in supplemental briefs. Although these courts did not *explicitly* decline to apply the procedural bar rule, their mere analysis of *Booker*, *Blakely* and *Apprendi* issues raised in supplemental briefs demonstrates that they declined to apply the anomalous Eleventh Circuit rule.

The bottom line is each circuit applies *Booker / Blakely* issues even where the defendant raises the claim after his initial brief has been filed. Therefore, the Eleventh Circuit's rigid application of its procedural default rule[7] has been almost universally rejected.

d. As for the policy considerations raised by Hogan (at pgs. 22-23) – that lawyers will either raise every conceivable claim or will simply file an *Anders* brief – Respondent does not disagree, saying that "the same could be said of any procedural default rule." (Response at p. 17). Respondent's cavalier contention ignores the reality of the overburdened courts of appeal. Only the Eleventh Circuit seems eager to deal with this avalanche of frivolous claims that now must be raised in each defendant's initial brief. *See, e.g., United States v. Pipkins*, 02-14306, 2005 WL 1421449 (11th Cir. June 20, 2005) ("Even if our precedent at the time foreclosed their argument, the defendants still had to raise this issue in their initial brief and assert that our precedent was wrongly decided in order for us to consider it. It is through this process that the law evolves.").

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[7] The Eleventh Circuit has held firm to the rule, as seen recently in *United States v. Levy*, No. 01-17133, 2005 WL ___ (11th Cir. July 12, 2005).

CONCLUSION

We respectfully submit that Judge Tjoflat is right in that the Supreme Court will "hopefully . . . correct this [anomolous] practice" in the Eleventh Circuit. *Vanorden*, 2005 WL 1531151 at *16. As he explains: "The upshot of our rule, therefore, is that a Supreme Court decision that we are directed to apply retroactively to *all* cases still pending on direct review, will not apply at all to cases on direct review like this one." *Id.* at 15. That hardly seems fair. We respectfully request, therefore, that this Court either hear this case on the merits or grant the petition, vacate the decision below, and remand for further consideration, notwithstanding the Eleventh Circuit's procedural default rule.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 02-10368

GARLAND HOGAN,

Appellant,

vs.

UNITED STATES
OF AMERICA,

Appellee. /

APPELLANT GARLAND HOGAN'S MOTION TO ADOPT ALL MOTIONS, PETITIONS AND PLEADINGS FILED BY CO-APPELLANTS

Appellant Garland Hogan, ("Hogan") moves this Court to enter an Order granting Hogan's Motion to adopt All Motions, Petitions And Pleadings filed by Co-Appellants. As grounds therefor, Hogan states as follows:

1. Because of the complex nature of this case including voluminous trial transcripts, multiple appellants, and numerous post-trial motions, undersigned counsel does not wish to further burden this court with duplicate pleadings. Each issue, argument and authority is applicable to Hogan. All have been addressed by Co-Appellants.

2. Further pleadings by Hogan would repeat issues already covered by Co-Appellants. Therefore, in an attempt to minimize duplication and otherwise streamline these proceedings, undersigned counsel respectfully requests

this Court to enter an Order which allows Hogan to adopt any and all pleadings filed by his Co-Appellants.

3. In so doing, Hogan specifically requests leave to adopt all motions filed to date including, but not limited to:

Motions By Co-Appellant Lewis

(a) Lewis' Motion for Leave to File Supplemental Brief As To Sentencing Enhancements Pursuant to *Blakely v. Washington*, filed on or about June 29, 2004.

(b) Petition For Rehearing En Banc; To Remand This Case For Resentencing In Accordance With *Blakely v. United States*; And/Or, To Allow Supplemental Briefing.

Motion By Co-Appellant Pierce

Co-Appellant Piece's Petition for Rehearing filed on or about July 7, 2004.

Motion By Co-Appellant Tirado

Co-Appellant Tirado's Motion To: (1) Rehear And Reverse Tirado's Conviction And Sentence; (2) To Remand this Case for Resentencing in Accordance With *Blakely v. Washington*; Or, (3) Allow Supplemental Briefing thereon, filed on or about July 9, 2004.

Motions By Co-Appellant Balsam

(a) Co-Appellant Balsam's Petition For Rehearing (or Hearing) En Banc.

(b) Co-Appellant Balsam's Motion To Adopt All Motions, Petitions And Pleadings of Defendants.

4. Because undersigned counsel has not received copies of all pleadings filed by Co-Appellants, it is not possible to point out every pleading Hogan seeks to adopt. If, however, this Court grants Hogan's Motion to adopt *all* pleadings filed by co-Appellants (including all pleadings, motions and petitions filed to date plus those which have yet to be filed) the issue will be resolved without need for subsequent motions.

WHEREFORE, Appellant Garland Hogan moves this Court to enter an order granting Appellant Garland Hogan's Motion To Adopt All Motions, Petitions and Pleadings of Co-Appellants.

Respectfully submitted,

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By: /s/ Janice Burton Sharpstein
Janice Burton Sharpstein
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant Garland Hogan's Motion To Adopt All Motions, Petitions And Pleadings Filed By Co-Appellants was MAILED and FAXED on this 21 day of July, 2004, to the following:

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